COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-11621
(A.C. No. 2013-P-1884)

DONALD THOMAS SCHOLZ,

Plaintiff-Appellant

v.

BOSTON HERALD, INC., GAYLE FEE
and LAURA RAPOSA,

Defendants-Appellees

ON DIRECT APPELLATE REVIEW OF A JUDGMENT OF
THE SUFFOLK SUPERIOR COURT

BRIEF OF THE DEFENDANTS-APPELLEES

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ISSUES PRESENTED

1. Where Donald Thomas Scholz, a public figure, cannot point to any actual false statement of fact of and concerning him that defames him in any of the Herald articles, whether an "insinuating overtone" can serve as the basis for his defamation claim.

2. Assuming the Herald could be reasonably held to have expressed the "view" that Scholz "caused" Delp to take his life, whether given the requirement that an assertion be "objectively verifiable" to be actionable, the Superior Court was incorrect to hold that what was in the mind of a deceased person that motivated him to take his life was non-actionable opinion.

3. Where the Herald articles disclosed the verbatim quotes of those whom it interviewed, included cautionary terms and disclosed facts and quotations indicating that Scholz was not the cause of Delp's decision to take his life, whether the Superior Court's ruling that any "view" expressed was non-actionable was correct for an additional reason.

4. Where the Superior Court correctly found that the Herald had accurately reported what Micki Delp and others had told it, and that their statements were based on what Delp had himself told them, whether summary judgment should be affirmed on the additional ground that Scholz cannot meet his burden of showing that the Herald published its articles with a "high degree of awareness of their probable falsity."

STATEMENT OF THE CASE

The public figure and founder of a rock band ("Scholz") cannot identify an actual false statement of fact of and concerning him that defames him which appears in any of the articles published by the defendants ("the Herald") about the suicide of the band's lead singer, Brad Delp ("Delp"). He neverthe-

less claims that in reporting the views expressed by Delp's close friend and former wife, Micki Delp ("Micki")[1], about Delp's state of mind in the last months of his life, the Herald "insinuated" that Scholz was "to blame" for Delp's decision to take his life. Scholz maintains this even though Micki did not even mention Scholz in her interview with the Herald, and the Herald did not report that she had mentioned Scholz.

The Superior Court found that there was no genuine dispute that the Herald had accurately quoted Micki and accurately reported her views and those of others. It found that, indeed, those views were based on what Delp had himself told them. Nor was there any dispute that the articles repeatedly quoted sources and cited facts indicating that Scholz was not responsible for Delp's decision to take his life.

This case presents the specific question of whether a newspaper can, consistent with the First Amendment, be held liable for reporting peoples' stated views about what was in the mind of a deceased person at the end of his life that motivated him to end it. It presents the broader question of whether a free

[1] The relationship between Micki and Delp was so close that Delp left Micki, the mother of his two children, a suicide note.

press can report peoples' views on what motivated others, including public figures, to do or not do certain things, without fear of being held liable for defamation.

STATEMENT OF FACTS

The summary judgment record contained the following undisputed facts. Delp, the longtime lead singer of the band Boston, took his life on March 9, 2007, shortly before the start of a Boston tour. He told numerous close friends that he was "distraught" about the tour, and that he was "terrified" to tell Scholz. Scholz had scheduled rehearsals to begin on March 24, 2007. On February 28, 2007, Scholz informed Delp that summer performances had been confirmed. On March 7, 2007 Scholz's tour manager called Delp to confirm arrangements for the tour. Less than 36 hours later, Delp took his own life. A592, 693-704, 745, 831-837, 839-842, 909-912.

Delp identified the abuse he had suffered as a child as the cause of his lost "ability to speak up for himself." The lead singer in a band whose songs were extremely high and "very painful on his voice," Delp had had Scholz scream at him about not being able to hit the notes "properly." Scholz would scream "If

you ever, ever hit another note like that, I will take the microphone and I will throw it in the crowd. They sing better than you." Delp "would hang his head and would be visibly upset by it, but didn't want to speak." For the rest of his life, Delp told his wife and closest friends that "he was afraid to speak back to Tom." Scholz's treatment of the original members of Boston - Delp, Barry Goudreau, Sib Hashian, and Fran Sheehan - led them to refer to themselves out of Scholz's earshot as "The Browbeats." The poor relations between Scholz and the others led to lawsuits and the acrimonious departure of Goudreau, Hashian and Sheehan, all close friends of Delp.[2]

Scholz, an MIT graduate, had early on presented Delp, a high school graduate, with a document which Delp signed relinquishing any interest he held in the name "Boston." This deprived Delp of any rights in or to Boston. Delp had told others that he was unhappy about how Scholz had "punished" his friends, that he felt "humiliated" for not having stood up to Scholz and that he was, in his view, a "wimp" for never being

[2] A45 at ¶14, 601-602, 604, 606, 608, 612, 618, 622, 625-654, 706, 708, 725-727, 731, 733, 734, 740, 767, 821, 837-838, 880.

able to confront Scholz. A591, 623-624, 627-628, 632-633, 654-692, 807-821, 824, 831-833.

Delp also told his friends that Scholz had mistreated him financially, including by paying himself large sums of money out of band revenues as "expenses," thereby reducing Delp's income. When a federal judge ruled that Scholz had acted dishonestly in paying himself hundreds of thousands of dollars in order to avoid paying royalties, Delp told his wife that he was afraid to speak to Scholz about it because Scholz was "a man who believed his own lies." A660-667, 673, 711-713, 717-721.

Delp told friends that "[h]e hated being in Boston. He hated that he still had to do it. He said he was embarrassed to be associated with Boston." Delp suffered panic attacks and related seizures while touring with Boston, anxious "that he wasn't going to do a good job and that he wouldn't be received well from the crowd or from Tom...[because] Tom had berated him previously and yelled at him." He told others that "he didn't like Tom. He didn't trust Tom. He felt that Tom had taken advantage of him financially, especially." When one member quit Boston, Delp "expressed his envy of me for having the guts to stand up to

Tom…[a]nd to leave the band, to quit the band. And he expressed that he wished that he was 'not such a wimp' and was able to do the same thing."[3]

Delp expressed "a constant fear" that Scholz would sue him as he had sued others, telling friends that he was "terrified" of Scholz, that Scholz was a "bully" and an "asshole" and that "he was afraid that if he decided not to tour, Tom would come down hard on him." Indeed, on January 6, 2007, just two months before he took his life, Delp emailed Scholz about the upcoming tour, telling him he wanted to talk but assuring him "nothing confrontational. I generally avoid confrontation of any kind like the plague." A693-712, 705, 715, 848-849.

On Boston's last tour before Delp's suicide, Delp told his friends "he wished [Boston] would just end…I wish Tom would just quit." One band member stated:

> Brad came onto the tour bus after one performance and he says, "I just want to go home. I'd like the tour to end and I just don't want to do this no more," and I says "Well, Brad, why didn't you tell Tom…Just go talk to him and explain to him how you would like to get out or whatever – or whatever your feelings are to leave Boston…" He says, "I can't."

[3] A609-610, 655-658, 673-675, 679-684, 688-705, 761, 774, 783-784, 831-839, 866-867, 897, 903, 1074.

Delp spoke constantly about quitting, saying that one way was to commit suicide.

> "[I]t was one occasion when we were talking about, you know, when he would quit…[H]e goes 'I can always just kill myself.' He goes 'I can always just kill myself.'"
>
> "I go, 'Brad, what are you talking about? You know, don't joke around with me like that.' He looked at me with that eye directly. 'No, I'm serious,' and he walked away."

A781-786.

It had become increasingly difficult and painful for Delp to sing Boston's very taxing, high notes as he grew older. Delp had long relied on his bandmate Fran Cosmo to help him sing in concerts, and freely talked about his dependence on Cosmo singing many of the high notes. He told Cosmo during the last tour that he simply "couldn't do it without him." Delp told one friend shortly before he took his life "that he was really upset that Tom had fired [Cosmo] because [he was] his lifeline because Brad could not hit the high notes anymore and Fran could." A723-733, 737, 740, 749-758.

In late 2006, Scholz informed Delp that he had fired Cosmo from Boston, and that Boston would go on tour in 2007. Delp told friends that "This was going

to be it. He was finally going to stop being such a wimp, in his words, and stand up to Tom."

> He would say that he felt like a beat-up dog that had no dignity left and still hung around with his abuser.
>
> . . .
>
> Those were his exact words. He felt that Tom had berated him so badly that he couldn't leave - - that he couldn't leave his abusive owner. He had been beaten into submission.

A609-611, 737, 831, 835-836.

Delp told Micki and numerous others that he was "distraught" and "despondent" about the firing of Cosmo. He told one friend that "[h]e didn't know how he was going to do it for a whole concert tour. He didn't know what he was going to do.

> He was horrified...He said he didn't want to do it. He didn't want to work with Tom. He was too old to be singing these songs. He just didn't want to do it.

A731-745, 841, 859, 1002.

Also in the fall of 2006, Scholz intervened to block Delp from performing together with Goudreau and Hashian at a charity event. Delp told Micki and over a dozen of his close friends how upset he was at what Scholz had done, that it was his (i.e., Delp's) fault for not standing up for his friends, that he was extremely upset at Scholz for what he had done to them,

and at himself for permitting it.

> Brad told me he felt horrible about it. He said he was so embarrassed. He said that he should have been able to stand up and tell Tom 'I've been doing it with these guys for many years. I should be singing with them and not Boston. I should be singing with them.'

An email written by Delp in November, 2006 confirms Delp's feelings about this. A801-821, 5270.

On January 22, 2007, Delp went to his doctor, presenting with heart palpitations and shortness of breath. He told his doctor "they were getting ready to go on tour" and

> that he was having a lot of stress from the band. He actually mentioned to me that he was considering leaving the band. He told me that he was having a lot of stress, that a great deal of it had to do with the band, and that he was contemplating quitting the band. He - the only name that he mentioned to me specifically was Tom Scholz.

A888-893.

On February 1, 2007, a friend found Delp more visibly despondent than he had ever seen him about Boston and the upcoming tour. On February 20, 2007, Delp told Micki how unhappy he was about the tour. On February 27, 2007, Delp purchased the duct tape and the batteries for a carbon monoxide monitor that were found at his suicide scene. On February 28, 2007, Delp

called Micki for the last time and told her what she should do "if anything happened to him" on the upcoming tour. A600, 841-842, 901-903, 1120-1122.

Delp's suicide attracted widespread publicity. In researching the article she wrote for the Herald's March 15, 2007 edition, reporter Gayle Fee interviewed a variety of individuals who were close to Delp, including Delp's former manager Paul Geary and Ernie Boch, Jr., who was close friends with Goudreau and Hashian. Both Geary and Boch have confirmed that they spoke to Fee, that they were accurately quoted, and that the Herald accurately conveyed either their views or the views of Delp's friends and family. A912-974, 929-937, 940-951, 971-973, 3100-3123.

The March 15th article, entitled "Suicide confirmed in Delp's death," contained no statements that Scholz was the reason for Delp's decision to take his life. On the contrary, it disclosed that:

- "the cops were not told why [Delp] took his life"
- "Friends said it was Delp's constant need to help and please people that may have driven him to despair"
- "Delp remained on good terms with both Tom Scholz … and Goudreau Fran Sheehan, and Sib Hashian, former members of Bos-

ton who had a fierce falling out with Scholz in the early '80's"

- "But the never-ending bitterness may have been too much for the sensitive singer to endure..."

- "Some friends expressed surprise at the timing of Delp's suicide. He had been planning a tour with Boston... But friends say there was a dark side..."

- "'He was a sad character to begin with', said one close pal. He didn't think highly of himself. He was always very self-deprecating. He's always been that way, though, so there was really nothing 'to lead anyone to believe that we would do this'"

(emphasis supplied). A363-364.

On March 16th, Micki decided that she wanted to speak to the Herald about what Delp had been feeling. In response to Fee's questions, Micki made the statements that she is quoted as saying in the March 16th article. None of them mentioned Scholz:

(1) Shortly before his death, Brad was "upset" about his friend and bandmate Fran Cosmo being "disinvited" from Boston's tour;

(2) "Barry and Sib are family and the things that were said against them hurt. Boston to Brad was a job, and he did what he was told to do. But it got to the point where he just couldn't do it anymore."

(3) "No one can possibly understand the pressure [Delp] was under."

(4) "Brad lived his life to please everyone else. He would go out of his way and hurt himself

> before he would hurt somebody else, and he was in such a predicament professionally that no matter what he did a friend of his would be hurt. Rather than hurt anyone else, he would hurt himself. That's just the kind of guy he was."

A975-982, 993-998.

Micki has confirmed repeatedly that every quote attributed to her is accurate. She confirms that, although she did not use the "precise words" that had been used by the Herald in its lead and elsewhere without quotations to paraphrase Micki, the Herald's paraphrasing of what she said was also accurate. It was in response to Fee's question about whether she knew of anything that would have upset Delp so much that he would have taken his life that Micki replied that what she knew had upset him the most at the end was the "dis-invitation" of Cosmo:

> I would say despair is a fair word [to describe how Delp felt about Fran being fired] and I would say despondent is a word that would describe it.

A998, 1002, 1006-1018, 1066-1067, 1072-1077, 1080, 3097-3098.

As soon as she got off the phone interview with Micki, Fee sent an email to Scholz' publicist recording what Micki had told her - - "she says Brad was in despair because Fran Cosmo was disinvited from the

summer tour" - - and asking for a comment. Scholz replied with a statement that the firing of Cosmo had been a "group decision," suggesting that Delp had approved it. The Herald duly reported Scholz' statement in the March 16th article. A382-383, 982-983. The article also disclosed that Delp had left a suicide note which blamed his decision to end his life on himself:

> "Mr. Brad Delp. J'ai une ami solitaire. I am a lonely soul." said one of the notes. "I take complete and sole responsibility for my present situation."

It further disclosed that Delp's fiancée had told police that Delp "had been depressed for some time, feeling emotional (and) bad about himself." A381-384.

It was Micki's opinion that the exclusion of Cosmo was "a large part of Brad's decision to take his life" and she has confirmed that the Herald conveyed her personal opinion accurately:

> My opinion of what caused Brad to take his life - I had my own opinions about it, and I feel somewhat responsible in actually maybe conveying that to the Herald at this time. And it was my personal opinion that Fran being disinvited from this tour was a large part of Brad's decision to take his life.
>
> . . .
>
> Brad could not--could not do that tour without Fran. He could not do it, and he expressed that to me. He told me he was quitting the band. His--his distress at the sit-

> uation of Boston had dramatically increased in frequency of him speaking about it with me, increased in the intensity of the way he expressed it to me. So sitting here today, I'm even more convinced that my opinion that I held then is in fact the--exactly what caused Brad to take his life.

A1014-1015.

The headline of the March 16th article was "Pal's Snub Made Delp Do it: Boston Rocker's Ex-Wife Speaks." The online edition contained those words and also added the sub-headline: "Delp's ex says 'No one can possibly understand.'" A381 (emphasis supplied).

The Superior Court found that the Herald articles contained no statement that Scholz was the reason for Delp's decision to take his life, and no statement that anyone else had so stated. A1767-1768. Even treating the Herald's articles as "insinuating" that he was the reason, the Court found that any view expressed by the Herald about what was in the mind of a deceased person that motivated him to end his life was not "objectively verifiable," and therefore constituted non-actionable opinion. It also found that the articles fully disclosed the facts on which any such view was based, and did not imply the existence of undisclosed facts, making such a view non-actionable in any event.

SUMMARY OF THE ARGUMENT

Where Scholz, a public figure, could point to no actual false statement of fact defaming him in the articles and the Superior Court acknowledged that there was none, the Herald was entitled to summary judgment on the threshold basis that a public figure cannot maintain a defamation action based on an "insinuating overtone" generated by the aggregate "impression" left by non-actionable statements. (Infra at 16-23).

Even if the Herald could be held liable for the "innuendo" conveyed by non-actionable statements, the Superior Court correctly found that conveying the "view" of what a deceased person was thinking at the end of his life that motivated him to decide to end that life is not "objectively verifiable" and would therefore be non-actionable opinion. This is particularly true where the Herald's articles contain all of the well-established indicia of opinion. (Infra at 23-39).

Further, the Superior Court correctly ruled that the Herald fully disclosed the basis for any "view" it expressed: the verbatim quotations of Micki Delp and the others which, the Court properly ruled, the Herald had indisputably accurately reported. (Infra at 39-

44).

Finally, the Superior Court's accurate ruling that the Herald had indeed reported what Micki and other friends had said to it, and that these statements were in fact based on what Delp had said to them, entitled the Herald to summary judgment on the additional ground that Scholz cannot meet the constitutional standard of demonstrating by clear and convincing evidence that the Herald published its articles with a high degree of awareness of their probable falsity. (Infra at 44-52).

ARGUMENT

I. BECAUSE SCHOLZ, A PUBLIC FIGURE, CANNOT POINT TO ANY ACTUAL FALSE STATEMENT OF FACT OF AND CONCERNING HIM THAT DEFAMES HIM, SUMMARY JUDGMENT SHOULD BE AFFIRMED BECAUSE "AN INSINUATING OVERTONE" CANNOT SERVE AS THE BASIS FOR HIS DEFAMATION CLAIM

The Court will observe that none of the Herald articles contain statements that Scholz caused Delp to take his life or even that others stated that Scholz caused Delp to do so. For this reason, both here and in the Superior Court, Scholz has made considerable use of the devices of "cutting and pasting" words and phrases from different places in the articles, and then "supplying" language that did not actually appear

anywhere. His theory was not that the Herald had actually made identifiable false statements of fact defaming him that could be found in the actual articles, but that the overall "insinuation" was that Scholz was responsible for Delp's decision to take his life. Scholz repeatedly acknowledged that he was relying on what he claimed was a defamatory "impression" rather than any actual, identifiable false statement of fact defaming him. See A423, 441, 7395 ("Blaming by unmistakable implication and insinuation").

For its part, the Superior Court confirmed that "a searching examination of all three articles reveals no...statement" by anyone to the effect that Scholz was the reason Delp took his life, A1767, and that, instead, Scholz's theory was that "the articles insinuated that Scholz caused Delp to commit suicide." A1756 (emphasis supplied). See also A1757 ("[T]he defendants published the opinions of others and insinuated their own as to why Brad Delp killed himself"), A1768 ("Scholz alleges that others read the statements in all three articles as insinuations that the plaintiff caused Delp to commit suicide.") (emphasis supplied). It correctly characterized the parties' respective positions:

> The defendants argue that the article provides substantially correct facts and leaves it [to] the reader to draw his or her own conclusions. Scholz counters by claiming that, taking the articles as a whole, a reader could interpret them as implications that Scholz caused Brad Delp's suicide.

A1764 (emphasis supplied).

The Court was unable to identify any false statement of fact of and concerning Scholz that actually appeared in any of the articles, let alone an actual statement that could reasonably be construed as blaming Scholz for Delp's suicide. For his part, Scholz was unable to cite to any.

However, the Superior Court bypassed the authority which, the Herald submitted, entitled it to summary judgment at the threshold: that public figures such as Scholz may not rely on a collection of non-actionable statements and assert that "in the aggregate they have an insinuating overtone." Milhalik v. Duprey, 11 Mass. App. Ct. 602, 605-606 (1981) (vacating jury verdict in favor of public official who had prevailed on defamation-by-innuendo theory where actual article contained no false and defamatory statements of and concerning plaintiff); Gouthro v. Gilgun, 12 Mass. App. Ct. 591 (1981) (affirming that after New York Times v. Sullivan, 376 U.S. 254 (1964), a series of individually

non-actionable statements could not be the basis for a defamation action by a public figure "because in the aggregate they have an insinuating overtone"). See also Salvo v. Ottaway Newspapers, 57 Mass. App. Ct. 255 (2003) (reversing denial of summary judgment where Superior Court concluded that "reading between the lines" of the articles, "defamatory inferences might be drawn from the facts reported").

In Milhalik, a school committee member claimed to have been defamed by an article entitled "Riddle," which did not identify plaintiff, but contained "clues." The Superior Court instructed the jury, without objection, that it was undisputed that the separate statements in the riddle "were not defamatory" and, indeed, "were true, taken individually." It nevertheless went on to instruct the jury that it could determine whether "in context, taken together," the statements defamed plaintiff in that they conveyed the "impression" that Milhalik misused power for personal gain. Milhalik, supra at 603. The jury returned a verdict for plaintiff. Id. at 604.

The Appeals Court reversed, holding that in the case of public figures, the First Amendment does not permit recovery based on a defamatory "insinuation"

arising from the aggregate impression left by a series of non-actionable statements.

> It would be incongruous to permit a public official to recover where statements…were true as far as they went. The purposes (of not stifling discussion protected under the First Amendment) of the New York Times rule would not be served by permitting recovery for the statements here in issue. We think that their falsity (as that term is used in the recent cases following the New York Times rule) has not been established merely because in the aggregate they have an insinuating overtone.

Id. at 606 (emphasis supplied).[4]

The Milhalik Court recognized that requiring public figures to demonstrate that they have been defamed by actual false, defamatory statements protects against the erosion of First Amendment safeguards post-Sullivan. See, e.g., Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 775 (1986) ("[A]s one

[4] Commentators recognize Milhalik as requiring that public figures demonstrate that they have been defamed by actual, actionable statements of fact, rather than "insinuation" or "implication" based on non-actionable statements. See, e.g., 45 Mass. Pract. §6.22 n.6 (citing Milhalik and "noting that while earlier Massachusetts cases recognized liability for insinuation, the New York Times standard of proof applicable to public figures requires a false statement of fact); R.D. Sack, Sack on Defamation at 2-36 (4th ed. 2010) (citing Mihalik; "several other courts have concluded that, at least where there is a public figure or public official plaintiff, there cannot be libel by implication unless there is a specific fact omitted from the statement…and that omission renders the statement false").

might expect given the language of the Court in New York Times, a public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation"); Garrison v. Louisiana, 379 U.S. 64, 74 (1964) ("We held in New York Times that a public official might be allowed the civil remedy only if he establishes that the utterance was false"). The Supreme Court recently reinforced this point. Air Wisconsin Airlines Corp. v. Hoeper, -- U.S. -- , 134 S. Ct. 852, 861 (2014) (reversing defamation verdict for plaintiff; not merely falsity, but material falsity, is required).

Other jurisdictions have embraced Milhalik's refusal to permit defamation-by-insinuation theories by public figures. See, e.g., Strada v. Connecticut Newspapers, Inc., 193 Conn. 313, 326 (1984) (affirming summary judgment; "the media would be unduly burdened if, in addition to reporting facts about public officials and public affairs correctly, it had to be vigilant for the possible defamatory implication from the report of those true facts"); Pietrafeso v. D.P.I., Inc., 757 P.2d 1113, 1115 (Col. Ct. App. 1988); Diesen v. Hessburg, 455 N.W.2d. 446, 451 (Minn. 1990) (public officials cannot assert "falsity by implication where

the challenged statements are true"); Fitzgerald v. Tucker, 737 So.2d 706, 717 (La. 1999) ("Truthful facts which carry a defamatory implication can only be actionable if the statements regard a private individual and private affairs. Where public officers and public affairs are concerned, there can be no libel by innuendo").

Without mentioning Milhalik or Gouthro, the Superior Court rejected the Herald's argument based on them, holding not only that insinuation was enough, but that it was enough that "others read the statements in all three articles as insinuations that the plaintiff caused Delp to commit suicide."[5] A1768 (emphasis supplied), citing Reilly v. Associated Press, 59 Mass. App. Ct. 764, 774 (2003). Reilly, however, involved a claim by a private figure, not a public one. Indeed, the Herald has been unable to find a Massachusetts case in which a public figure has been permitted to recover on a defamation-by-innuendo theory,

[5] The Court indicated that "the artful placement of information" "suggested" a link between bad feelings within the band and Delp's feelings about Scholz, and that in turn "suggested" a linkage with Delp's suicide. But this stretching underscored the Court's impermissible reliance on a highly strained "insinuation" theory, at the expense of requiring an actual, identifiable, actionable defamatory statement of fact.

much less one where, like here, the actual statements of fact are either concededly true or plainly non-actionable. The Herald respectfully submits that where Scholz, a public figure, could not point to actual, identifiable, false statements of fact that imputed defamatory wrongdoing to him, and where the Superior Court acknowledged that the articles disclosed no such false statement of fact, summary judgment in its favor should be upheld on that basis alone.[6] See Gabbidon v. King, 414 Mass. 685, 686 (1993) ("It is well-established that, on appeal, we may consider any ground apparent on the record that supports the result reached in the lower court").

II. TO THE EXTENT THAT THE HERALD CAN BE REASONABLY FOUND TO HAVE CONVEYED THE "VIEW" THAT SCHOLZ "CAUSED" DELP'S SUICIDE, THE SUPERIOR COURT PROPERLY CONCLUDED THAT SUCH A VIEW WAS NON-ACTIONABLE OPINION

The Herald submits that by reporting Micki's views about her former husband's state of mind in the last months of his life, views that did not even mention Scholz, by reporting the views of friends about

[6] Permitting Scholz to advance an "insinuation-based-on-the-aggregate-of-non-actionable statements" theory would undermine the requirement that defamation plaintiffs identify, plead and prove that there is an actual, identifiable false statement of fact of and concerning plaintiff which defamed him. See, e.g., Eyal v. Helen Broad. Corp. 411 Mass. 426, 432 n.7 (1991).

Delp's feelings about the band Boston, and by reporting that Delp was sensitive and depressed, it cannot reasonably be found to have expressed the "view" that Scholz "caused" Delp's suicide. It submits that it accurately reported people's non-defamatory statements, reported on the well-known history of the band, repeatedly used cautionary terms such as "may have," and repeatedly pointed out that no one knew why Delp had taken his life. See Dulgarian v. Stone, 420 Mass. 843, 848 (1995) ("Viewed as a whole, the tenor of the report was accurate"); Salvo, supra at 262-263 (Reversing denial of summary judgment; "[T]he article provides substantially correct facts…leaving it to the readers to draw their own conclusions"). However, to the extent that the Herald may be said to have expressed the "view" that Delp took his life "because of" Scholz, the Court correctly ruled that such a view would constitute non-actionable opinion.

That a statement must be "objectively verifiable" and "provably false" in order to be actionable under our Constitution is the "Red Line" of Constitutionally-protected free expression. Milkovich v Lorain Journal Co., 497 U.S. 1, 19-20 (1990) (statement must be "provable as false" in order to be actionable); Levin-

sky's, Inc. v. Wal-Mart Stores, Inc., 127 F.3d 122, 127 (1st Cir. 1997) (statement not actionable unless it contains an objectively verifiable assertion); Veilleux v. Nat'l Broad. Co., 206 F.3d 92, 108 (1st Cir. 2000) ("Only statements that are 'provable as false' are actionable"). This Court has affirmed the same black-letter rule. Cole v. Westinghouse Broad. Co., Inc., 386 Mass. 303, 312 (1982) ("An assertion that cannot be proved false cannot be held libelous").

Here, as the Superior Court pointed out, Scholz would be required to prove what a deceased person was thinking at the moment that he took his life that motivated him to take it. Indeed, the Court correctly pointed out that it was even more obviously impossible to prove what factor motivated Delp to decide to end his life in the context of this case:

> Here, the plaintiff is obligated to factually disprove a mental state, not satisfying a jury that a mental state existed. Scholz is compelled to prove that Delp was actually and factually not motivated - at all - by concerns for which Scholz was responsible. In other words, Scholz must disprove Delp's mental state vis a vis Scholz.

A1775 (emphasis in original). It was Scholz himself who stipulated that he would have to prove a negative in this case in order to prevail: that Delp's feelings

about him and about the prospect of continuing on with a band and under circumstances that made him so deeply unhappy played no part whatsoever in his motivation to take his life. The following exchange occurred during the extensive hearing on summary judgment:

> THE COURT: So, to what extent is the Court, say in a trial or even on this motion, going to have to decide what the true cause was of Brad Delp's suicide?
>
> MR. CARTER: The Court doesn't have to find what the true cause was, but has to find that the cause given by, reported by the Herald was not the true cause, was false. (emphasis supplied).

A7432 (emphasis supplied.)

Of course, the Herald did not report that Scholz was "the true cause" of Delp's suicide. But since that is Scholz's theory of the case, the Court correctly pointed out that if proving that Delp's unhappiness with Scholz was not a factor in his suicide was quite impossible even theoretically, it was worse than impossible given the undisputed facts that filled this summary judgment record. Those facts reflected the testimony from approximately twenty (20) of Delp's closest friends that Delp undisputedly told them that he was "humiliated," "belittled" and "abused" by, and was "terrified" of, Scholz, that he felt like a "wimp"

for not being able to stand up to Scholz, that he lived in "constant fear" of Scholz, and that he "hated being in Boston." A609-614, 655-657, 693-697, 701, 807-821, 835-836, 897.

It was likewise undisputed that Delp told others that Scholz was "a bully" and "an asshole" and that he "wanted out" of the band but was terrified that Scholz would retaliate against him, and that he was "distraught" and "despondent" at having to perform without Cosmo. It was undisputed that Delp told one friend that "This was going to be it. He was finally going to stop being a wimp, in his words, and stand up to Tom."

> He would say that he felt like a beat-up dog that had no dignity left and still hung around with his abuser.

It was similarly undisputed that six (6) weeks before he took his life, Delp told his physician that "he was having a lot of stress from the band," that "he was contemplating quitting the band," and that the only name he mentioned was that of Scholz. A608-609, 704-705, 733-745, 870, 888-892, 831-834.

There was no dispute that Delp had said these things, and many others like it. Therefore, what Scholz himself stipulated he would be required to do – to prove that he did not feature <u>at all</u> in Delp's mo-

tivation to take his life - was not merely theoretically impossible, but patently impossible given the volume and nature of the undisputed testimony that Scholz did feature in Delp's unhappiness at the end of his life. As the Superior Court put it:

> [T]he plaintiff is obligated to factually prove that Scholz was not in Delp's mind at all at the fatal moment. It is not that it is a difficult proposition to disprove that is controlling; it is that it is an impossible proposition to disprove. The proposition is not objectively verifiable.

A1775.

This Court has held that whether a statement is one of fact or opinion is generally a question of law. Cole, supra at 309. Where the plaintiff is a public figure, determining whether it is fact or opinion

> must reflect a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open, and that it may include vehement, caustic and sometimes unpleasantly sharp attacks...

King v. Globe Newspaper Co., 400 Mass. 705, 709 (1987).[7]

This Court has also pointed out that, "while in a criminal case the motive or intent of the defendant in

[7] The Superior Court noted that because Delp "had become an entertainment celebrity, a public figure for the purpose of the band Boston, and his death was a matter of public interest," his death "was an issue of public concern." A.1775 n.3.

performing an act is ordinarily treated as a question of fact, in a libel action a statement about a public [figure's] motive or intent is ordinarily treated as a statement of opinion." King, supra at 710 (emphasis supplied). The rule that speakers' views about other's motivations are treated as non-verifiable opinion has been oft-noted and oft-applied. See, e.g., Greenspan v. Random House, Inc., 859 F. Supp.2d 206, 224 (D. Mass. 2012) ("Whether or not this was the plaintiff's motive cannot objectively be proven as true or false"), aff'd, 2012 U.S. App. LEXIS 22285 (1st Cir. 2012); Nat'l Ass'n of Gov't Employees v. BUCI Television, Inc., 118 F. Supp.2d 126, 131 (D. Mass. 2000) ("The interpretation of another's motive does not reasonably lend itself to objective proof or disproof"); Carozza v. Blue Cross & Blue Shield of Mass, 2001 Mass. Super. LEXIS 506, *39-40 (Mass. Super. Nov. 16, 2001) (Gants, J.) (statements about "the personality and potential propensities of Carozza" were incapable of being proved true or false, and therefore, "they cannot be characterized as statements of fact).[8]

[8] See also Haynes v. Alfred A. Knopf, 8 F.3d 1222 (7th Cir. 1993) ("As for Luther's motives for leaving Ruby for Dorothy, they can never be known for sure (even by Luther) and anyone is entitled to speculate on a per-

If statements about a plaintiff's motivations or personality traits are not objectively verifiable and therefore non-actionable, statements about what led a deceased third party, whose mental processes are incapable of being explicated by direct or cross-examination, to take his life, are even more clearly not objectively verifiable. The Superior Court was on solid ground in so-holding; by definition, views about what was in the mind of a deceased person in his last days, weeks and months that motivated him to end his life are nothing more than conjecture.

Indeed, the Superior Court's decision was squarely supported by the one case either party has been able to locate that is directly on point - and contrary to Scholz' protestation, it is directly on point. In Gacek v. Owens and Minor Distrib., Inc., 666 F.3d 1142 (8th Cir. 2012), it was undisputed that the defendant actually had, in fact, told others that the plaintiff had caused the suicide of a man named Showers. Unlike in the instant case, where the Herald did

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son's motives from the known facts of his behavior"); Price v. Viking Penguin, 881 F.2d 1426, 1432 (8th Cir. 1989), cert. denied, 493 U.S. 1036 (1990) ("Assertions whose elements are unverifiable, including statements regarding motive, are intrinsically unsuited to serve as a basis for libel").

not make such a statement, the defendant actually had:

(1) told co-workers that something Gacek had done had "pushed Showers over the edge";

(2) told others that what Gacek had done was "the straw that broke the camel's back"; and

(3) stated that Gacek "was the reason for Bill's death."

Gacek, 666 F.3d at 1147. The United States District Court granted summary judgment to the defendant and the Eighth Circuit affirmed, holding that even actual assertions that the plaintiff was "the cause" of another's suicide are non-actionable opinion.

> None of these statements, however, express objectively verifiable facts about Showers' decision process. Rather, they express [defendant's] "theory" or "surmise" as to Showers' motives in taking his own life.

Id. In short, even where the defendant actually did assert that the plaintiff caused another to take his life, by definition that was not "objectively verifiable" or "provably true or false." It was no more than "theory" or "surmise." See Gray v. St. Martin's Press, Inc., 221 F.3d 243, 248 (1st Cir. 2000) (even a statement that is provable as false is non-actionable if "it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture or surmise, rather than claiming to be in possession of

objectively verifiable facts").

Here, all that the Herald published were the views of Micki Delp and others about what Delp was feeling. It did not assert that Scholz was "the reason" for Delp's suicide. Scholz's theory, therefore, is even more plainly non-actionable than the one rejected in Gacek.

The Superior Court's conclusion, and that of the Gacek Court, finds support as well in the medical literature. As the Director of Harvard University's Laboratory for Clinical and Development Research has written, suicide is "among the most perplexing of all human behaviors, partly because people often do not know their own minds." M.K. Nock, et al., Measuring the Suicidal Mind: Implicit Cognition Predicts Suicidal Behavior, 21 Psychological Science 511, 515 (2009) ("Suicidal thoughts are often held privately and are not detectable by others or even by oneself"). Other experts in suicidality agree. See, e.g., A.M. May and E.D. Klonsky, Assessing Motivations for Suicide Attempts: Development and Psychometric Properties of the Inventory of Motivations for Suicide Attempts, 45 Suicide and Life-Threatening Behavior 532, 541 (2013) ("Research suggests the decision to attempt suicide

may be motivated by many additional reasons" other than the motivation to die).[9]

Finally, the Herald articles had all the well-established indicia of opinion. As this Court reaffirmed recently in holding that an article was non-actionable opinion:

> The court must examine the statement in its totality in the context in in which it was uttered or published. The Court must consider all the words used, not merely a particular phrase or sentence. In addition, the Court must consider all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to what it is published.

Howell v. Enter. Publ'g Co. LLC, 455 Mass. 641, 671 (2010), quoting Lyons v. Globe Newspaper Co., 415 Mass at 258, 263 (1993).

First, both the headlines of the March 16th article and the article itself, based on Micki Delp's verbatim quotes about her former husband's state of mind, informed the reader expressly and repeatedly that the Herald was conveying her views. The context, from headlines to text, indicated that what was being reported was one person's opinion - with that one person

[9] See also N.Y. Life Ins. Co. v. Trimble, 69 F.2d 849, 851 (5th Cir. 1934) ("Perhaps always in the case of a sane man who commits suicide there is a motive; but in many cases the motive is not and possibly could not be proven").

being a woman whose sister was married to a former band member who had long been "warring" with Scholz. See A491 (Barry Goudreau a "former member [] of the band who had a fierce falling out with Scholz… The situation was complicated by the fact that Delp's ex-wife, Micki, is the sister of Goudreau's wife, Connie"). That the Herald was plainly repeating one person's view, and that it was a view of someone who might be expected to have a negative impression of Scholz, reinforced to the reasonable reader that Micki's views were opinion rather than provable fact. See, e.g., Brian v. Richardson, 87 N.Y.2d 46, 53 (1995) (where article disclosed potential bias of speaker, statements "could not have been reasonably understood by a reasonable reader as assertions of fact"); Gristede's Foods, Inc. v. Poospatuck (Unkechauge) Nation, 2009 U.S. Dist. LEXIS 111675 (S.D.N.Y. 2009) (speaker's alignment with one side "would signal readers that what is being read is likely to be opinion, not fact").

Second, Scholz himself alleges in this case that the Inside Track is a "gossip column." See, e.g., A423, 430, 461, 472 at n.32, A7395. This Court has repeatedly emphasized the distinction between even ordi-

nary columns and factual news stories, a distinction which is more pronounced where the column is a gossip column. See King, supra at 714 ("reasonable readers expect to read columnists' views and opinions as opposed to factual news stories"); Howell, supra at 671-672 ("While not on the 'op-ed' page of the newspaper, the article is replete with rhetorical flair and hyperbole typical of an opinion piece").

Third, the articles were replete not only with "cautionary terms," such as "may have," that indicated that the Herald did not purport to have actual knowledge of the motivation for Delp's suicide, but with express references to facts and quotations that pointed away from Scholz as the "cause."[10]

Fourth, the fact that the Herald presented a variety of views about Delp's suicide, including Delp's own statement attributing his suicide to his own problems, mitigates strongly in favor of concluding that any "view" that the Herald "expressed" was opinion, rather than fact. Cole, supra at 311 ("The audience which received the statements, first the reporters and later those reading the newspaper articles, were aware

[10] See Lyons, supra at 266 ("We hold that the use of the word 'apparently' made clear that the author... is indulging in speculation, or at most, deduction").

that Cole and WBZ-TV claimed different reasons for Cole's contested dismissal... These factors lend support to our view that the statements were matters of opinion rather than fact").

Finally, that the statements by Micki and others, which formed the basis for these articles, were manifestly made at a time of great emotion reinforced that they were opinion. See Sack, supra at 4-32 ("when uttered at a time of emotion, such as personal grief", statements are more likely to be considered opinion). This is because a reasonable reader will recognize them as such. See Gonzalez v. Gray, 69 F.Supp.2d 561, 568 (S.D.N.Y. 1999) ("A reasonable viewer would understand that [the defendant's] statements are not statements of fact, but represent the opinion of a distraught widower who recently lost his wife to a terrible illness"), aff'd, 216 F.3d 1072 (2d Cir. 2000); Reilly, 59 Mass. App. Ct. at 771 ("The reasonable reader could recognize these statements as generalizations uttered by a distraught pet owner").

Scholz urges upon the Court two cases involving an assertion blaming another for suicide: Rutt v. Bethlehem's Globe Publ'g Co., 335 Pa. Super. 163, 174 (1984) and McRae v. Afco-American Co., 172 F.Supp.

184, 186 (E.D. Pa. 1959). Notably, however, neither case involved the issue of whether the defamatory assertion was opinion.

He also cites what the Superior Court correctly notes was dicta in the Appeals Court's decision in Tech Plus, Inc., v. Ansel, 59 Mass. App. Ct. 12 (2003). A1774. In Tech Plus, the Superior Court (Gants, J.) had granted summary judgment on a defamation claim that alleged not only that someone "was anti-Semitic [but] had made derogatory, anti-Semitic jokes and comments in his presence and was 'constantly persecuting him' because of his Jewish heritage." Justice Gants held that what someone thought was not objectively verifiable and therefore non-actionable. In so doing, he issued a correct statement of the law with which the Appeals Court did not disagree:

> One either said something or she did not; one either did something of she did not. No such objective ascertainment is available when the question is whether one thought something or did not...[A] false statement of what one said or what one did is properly actionable as defamation but an alleged false statement as to what one thought is not.

Tech Plus v. Ansel, 1999 Mass. Super. LEXIS 84, *25 (Mass. Super. Ct. March 22, 1999) (emphasis supplied). The Appeals Court reversed on the basis that whether

the person had in fact told anti-Semitic jokes, and whether he had in fact engaged in conduct that was harassing, was conduct that was indeed objectively verifiable. 59 Mass. App. Ct. at 23.[11]

The Superior Court correctly observed that permitting a jury to decide whether a criminal defendant acted with a basic awareness of what he or she was doing was fundamentally different than permitting a jury to determine what, specifically, a deceased person was thinking at the end of his life that motivated him to make the decision to take his life. A1774-1775. Further, there are safeguards attending criminal trials, such as the requirement that proof be established beyond a reasonable doubt, that do not exist in a civil

[11] The other cases relied upon by Scholz are simply inapposite. See, e.g., N. Shore Pharm. Servs, Inc. v. Breshin Assocs Consulting, LLC, 491 F.Supp.2d 111 (D. Mass. 2004) (Magistrate), adopted 491 F.Supp.2d 111, 113-114 (D. Mass. 2004) (assertion had nothing to do with what motivated decedent's suicide, or whether a particular motivation was provable); Stepakoff v. Kantar, 393 Mass. 836 (1986)(same); Miga v. Holyoke, 398 Mass. 343 (1986) (nothing to do with what motivated the decedent to take her life, but rather whether correctional officer was negligent in failing to monitor her); Nutting v. Roche Bros. Supermarkets, 50 Mass. App. Ct. 572 (2000) (parties stipulated as to what precipitated suicide; therefore, motivation not at issue); Freyermuth v. Lufty, 376 Mass. 612, 618-620(1978) (involving whether car accident caused relapse of decedent's mental problems, not what the decedent was thinking about at the time he took his life that motivated him to decide to do so).

defamation case, where juries would be asked to "determine" motivation by a bare preponderance-of-the-evidence, that is, by a mere 51% to 49% calculation. Finally, while the jeopardy to a criminal defendant of having a jury decide whether he simply comprehended that he was committing a crime is real, the jeopardy to society at large of penalizing a free press (or others) from expressing their views on what motivated public figures to take the action they did is widespread and profound. The Superior Court correctly found any "view" conveyed by the Herald to be non-actionable.

III. EVEN IF THE HERALD CAN REASONABLY BE HELD TO HAVE "INSINUATED" AN "IMPRESSION" THAT SCHOLZ WAS THE "REASON" THAT DELP TOOK HIS LIFE, SUCH AN "OPINION" WAS BASED ON FULLY DISCLOSED, NON-ACTIONABLE FACTS

Even if the Herald could properly be found to have "insinuated" an "impression" that Scholz was "the reason" that Delp took his life, the Superior Court correctly found that the Herald could not be liable for such an opinion because it was based on fully disclosed, non-defamatory facts and views. As this Court has repeatedly held, the "expression of opinion based on disclosed or assumed non-defamatory facts is not itself sufficient for an action of defamation, no mat-

ter how unjustified or unreasonable the opinion may be or how derogatory it is." Dulgarian, supra at 850; Lyons, supra at 266 (reversing denial of summary judgment; "the challenged article clearly indicated…that the proponent of the expressed opinion engaged in speculation and deduction based on disclosed facts"); Nat'l Ass'n of Gov't Employees v. Central Broad. Corp., 379 Mass. 220, 226 (1979) (reversing denial of summary judgment; "hearers could make up their own minds and generate their own opinions and ideas which might or might not accord with Murphy's").[12]

Here, as the headline stated, the March 16th article was manifestly based on Micki Delp's statements, which were not only fully disclosed but quoted verbatim. These fully disclosed quotes are not only non-defamatory; they do not even mention Scholz. As the Superior Court observed, Scholz had no argument that the articles rested on undisclosed defamatory facts. On the contrary, as the Court stated succinctly:

> The bases of the inference were fully disclosed. Indeed, the bases of the inference constituted the articles.

[12] Scholz's effort to contest non-actionable statements does nothing to assist him. Lyons, supra at 264 n.7 ("An opinion based on a disclosed non-defamatory factual statement is not actionable even if the factual statement is false").

A1776 (emphasis supplied).

Thus, to the extent that the March 16th article can be said to have "insinuated" the Herald's opinion that Scholz was "responsible" for Delp's suicide, or even if it could be said to have conveyed the impression that this was Micki's opinion, the Superior Court correctly found that there was no genuine dispute that the Herald quoted Micki accurately, that the Herald disclosed what she had said, and that readers could make up their own minds (a) about the validity of Micki's purported "opinion"; (b) about the validity of the Herald's purported "opinion"; and (c) whether Micki or the Herald were actually expressing such an "opinion." As the Superior Court put it:

> Disclosure of the opinions of Micki and others is the basis of the opinion/inferences provided by the Herald to give the reader the opportunity to make up his own mind in assessing whether the defendants' published statement[s] offered a valid opinion as to the cause of Delp's suicide.

A1776. This was particularly true, of course, where the Herald had not merely disclosed Micki's verbatim quotes in full, but had gone out of its way to disclose the numerous facts that reflected that those closest to Delp had no idea why he had taken his life,

that the police had no idea, that he had been feeling depressed and emotional, and that he had left a suicide note expressly taking full responsibility for his decision and stating that no one else was responsible, among other things. See pp. 10-13, supra.

As for the headline conveying that Micki had said that in her view, the fact that Delp would not have the vocal support provided by Fran Cosmo had motivated Delp to take his life, the Herald fully disclosed precisely what Micki had said. As with the rest of the article, the Herald's disclosure of what Micki had said, as well as the facts pointing in a different direction, permitted readers to decide for themselves what Micki's opinion was, and whether it seemed valid. Moreover, as the Superior Court correctly pointed out, what Micki and the other sources said were their opinions. A1777. As it also pointed out, despite Scholz's heated argument that these opinions by Geary and Boch were "falsely attributed," there was no genuine dispute that, like Micki, they did indeed express these views to the Herald and stand by them. A1777.[13] Indeed,

[13] Indeed, on March 16, 2007, Goudreau, who was speaking with Boch in the aftermath of Delp's suicide, directly emailed Scholz, an email which debunks any notion that the Herald had "falsely attributed" the view

the Superior Court had before it charts, attached as Exhibits 1-3 to the Herald's motion for summary judgment, which broke down each of the Herald articles sentence-by-sentence, and provided the evidence that formed the basis for each sentence. These included references to the deposition testimony of Geary and Boch confirming speaking to the Herald about Delp's suicide and conveying the views referenced in the article. A366-379, 386-397, 401-403.

Here, as the Superior Court pointed out, Scholz never identified below, and does not identify now, what specific undisclosed defamatory facts were pur-

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Boch, who had spoken with Goudreau, had transmitted to the Herald:

> I can't explain the pain and suffering you have caused me and my family, Brad and his family, Fran Cosmo and his family...When you and I got back in touch and had e-mailed each other several times, I told Brad. His response was I can't believe your trying to reconnect with Tom when I'm trying to disconnect. He then told me the last Boston tour was the first time in his life he was embarrassed to go on stage...The situation surrounding the Doug Flutie show and Cosmo's dismissal were especially difficult for Brad, and the prospect of another tour weighed heavily on him..Brad's feelings about this were not something only the family was privy to. Even Brad's non-musical friends knew his feelings about the upcoming Boston tour...Tom, you abused Brad...We could not keep it under wraps forever.

A989-990, 5362.

portedly implied by the Herald. A1776. See Pritsker v. Brudnoy, 389 Mass. 776, 782 (1983) ("In the present case, it is not clear that any undisclosed facts are implied, or if any are implied, it is unclear what they are...[or] that they are defamatory"). The Superior Court had it right: the Herald disclosed the quotes, views, and the facts on which it based the purported "opinion" that it purportedly "insinuated." It went out of its way to disclose a long series of facts and quotations that cut against any conclusion that it was Scholz who was "responsible" for Delp's decision. For this additional reason, summary judgment should be affirmed.

IV. THE SUPERIOR COURT'S FINDINGS, SUPPORTED BY THE UNDISPUTED EVIDENCE, MANDATE SUMMARY JUDGMENT ON THE ADDITIONAL BASIS THAT SCHOLZ CANNOT MEET HIS CONSTITUTIONAL BURDEN OF DEMONSTRATING THAT THE HERALD PUBLISHED ITS ARTICLES WITH "A HIGH DEGREE OF AWARENESS OF THEIR PROBABLE FALSITY"

The Court did not need to decide whether Scholz could meet his burden of overcoming the Constitutional standard that he demonstrate by "clear and convincing evidence" that the Herald had published its articles with a "high degree of awareness of their probable falsity." Lane v. MPG Newspapers, 438 Mass. 476, 485 (2003) (affirming summary judgment where plaintiff

"could not sustain his burden" of demonstrating "by convincing clarity" that the defendants entertained serious doubts about their truth); Miligroom v. News Group Boston, Inc., 412 Mass. 9, 11 (1992) (same); St. Amant v. Thompson, 390 U.S. 727, 730 (1968) (reversing judgment for plaintiff; evidence that reporter had no personal knowledge of plaintiff's activities, relied on an affidavit from someone about whose credibility he had no knowledge and failed to verify information with other officials "fell short of proving St. Amant's reckless disregard for the accuracy of his statements about Thompson"). Although the Superior Court did not reach the issue, A1778, its findings based on the undisputed record support affirmance of summary judgment on an additional ground.

The Court examined Scholz's claim that Micki had "denied" making the statements the Herald attributed to her. This claim was a particularly red shade of red-herring: Micki confirmed that the Herald's quotations of her were accurate. Both she and the Herald were in accord, of course, that the two paraphrases or summaries of what Micki conveyed - openly disclosed as such by the absence of quotation marks - were not verbatim quotations. And Micki confirmed at great length

that the Herald accurately summarized both what she had told the Herald at the time, and what her view continues to be. The Superior Court held:

> [D]espite the plaintiff's argument that these opinions were falsely attributed, the court is persuaded that there is no genuine dispute that the statements of Micki and insider friends were actually made, and are still endorsed by them. That those individuals' beliefs about Brad Delp's mental state were based on their conversations with him or observations is well-established by the factual record of the case, as to which there is no genuine dispute.
>
> ...
>
> The plaintiff denies that Micki Delp made the statements attributed to her. This judge had ferreted through the plaintiff's opposing statements in the record to examine the source of that denial. This Court has reviewed the 2008 deposition of Micki Delp and finds she disclaimed only two sentences in which her comments were paraphrased. Plaintiff has no reasonable expectation of now proving that Micki Delp did not make the statements that she says she made, and stands by.[14]

A1777 (emphasis supplied).

The Court was correct. Micki confirmed over and over that the Herald's quotations of her had been accurate, and that the two sentences in the March 16th article paraphrasing what she had said accurately con-

[14] See also A1776 (The statements made by Micki Delp "have been fully endorsed by her...moreover, everything that Micki Delp said was her opinion of her ex-husband's situation based on conversation and observation").

veyed what she had said then and believes now. It was similarly undisputed that she knew that Delp had told others very similar things about his feelings about Scholz, his fear of Scholz and his dread of the upcoming tour with Scholz and without Fran Cosmo.

Where Micki and Delp's other friends had indisputably conveyed to the Herald what the Herald reported they had conveyed, Scholz had no reasonable expectation of demonstrating by the requisite "clear and convincing evidence" that they had published these views with a high degree of awareness of their probably falsity. Indeed, even had the Herald incorrectly interpreted the views expressed to it by Micki and others this would not have supported an allegation of actual malice. Time, Inc. v. Pape, 401 U.S. 279, 290-292 (1971) (actual malice could not be established where reporter made a rational but incorrect interpretation of his sources' comments); Veilleux, supra at 113-114 ("Reporters have leeway to draw reasonable conclusions from the information before them without incurring defamation liability"); BUCI, supra at 131 (the "deliberate choice of one among many rational interpretations of an ambiguous statement does not create a jury question of actual malice").

This Court recently affirmed summary judgment in a commercial disparagement case, reaffirming that even an erroneous interpretation of data could not meet the actual malice standard. In HipSaver, Inc. v. Kiel, 464 Mass. 517 (2013), it held that a publisher's interpretation of information that formed the basis of an article could not meet that standard, even where the information was allegedly flawed. It rejected the argument that "ignor[ing] or conceal[ing] evidence suggesting that the design of the clinical trial was flawed" amounted to publishing the challenged statements with a high degree of awareness of their falsity. Id. at 532.

> That concerns may have been raised about the chosen design does not mean that Dr. Kiel entertained serious doubts about the truth of the challenged statements.

Id. at 533.

Faced with the core undisputed facts that the Herald accurately reported the views that were expressed to it, and the further undisputed facts that these views were based on what Delp himself had said, Scholz resorts to overheated rhetoric to seek to overcome his daunting burden of demonstrating by clear and convincing evidence that the Herald published its ar-

ticles while entertaining serious doubts about their falsity. He once again accuses the Herald of "fabricat[ing] statements" from its sources. Scholz Br. at 37-40. As the Superior Court found after its searching review of the summary judgment record, the Herald did no such thing. Scholz similarly re-attempts the charge that the Herald "fabricated or materially distorted many of the statements attributed to Micki Delp." Scholz Br. at 41-44. The Court correctly observed that the summary judgment record disclosed that there was no genuine dispute that Micki had made the statements she was quoted as making, that where the Herald had plainly paraphrased her views they had done so correctly and that, moreover, those views remained her views. Simply put, Scholz's charges of "fabrication" were themselves fabrications.

Scholz next charges that the Herald "destroyed" its notes, and that the purported "destruction" is evidence of actual malice. First, it was undisputed that Scholz, who had been represented by a small army of lawyers and publicists for years, never even contacted the Herald about these articles between their publication in 2007 and his lawsuit in 2010, and that the discarding of notes by Fee sometime in that time frame

was wholly routine. See Kendall v. The Daily News Publ'g Co., 2011 V.I. Supreme LEXIS 36, *23-24 (V.I. 2011) (routine discarding of notes "is not sufficient to clearly and convincingly prove actual malice" where "at the time [reporter] threw away her notes from her conversation with [sources] she had no knowledge of the forthcoming lawsuit"); Torgerson v. Journal Sentimental, 200 Wis.2d 492 (1996) (reversing denial of summary judgment). Indeed, where Scholz had threatened Micki but not the Herald with a lawsuit, there was no record retention obligation on the Herald in any event. Fletcher v. Dorchester Mut. Ins. Co., 437 Mass. 544, 548 (2002) ("Persons who are not themselves parties to litigation do not have a duty to preserve evidence for use by others").

Most fundamentally of all, and as the Superior Court found, Micki, Geary, and Boch all confirmed the accuracy of the quotations provided to the Herald and/or the accuracy of the information contained in the articles. Where there is no dispute by the witnesses about what they conveyed to the reporter, the non-existence of notes does not constitute evidence of actual malice. See, e.g., Chang v. Michiana Tele. Corp., 900 F.2d 1085, 1089-1090 (7th Cir. 1990) ("Given

the concord of the parties to these conversations on what was said, any inference from the missing notes could not supply clear and convincing evidence of malice"), cited in Murphy v. Boston Herald, 449 Mass. 42, 61 (2007); Biskupic v. Cicero, 756 N.W.2d 649, 660 (Wis. 2008) (Even intentional destruction of notes could not defeat summary judgment given that the source confirmed her quotations which formed the basis for alleged defamation).

Scholz' other attempts to generate a jury issue on actual malice are similarly invalid. That there were individuals who disagreed with the Herald articles does nothing to disturb the undisputed fact that the Herald reported the views expressed; otherwise there would always be a viable actual malice claim. See, e.g., Gray, supra at 252 (rejecting argument that actual malice satisfied by evidence of "axe to grind" or that defendant failed to report that certain sources had no knowledge of any misconduct by plaintiff); Lluberes v. Uncommon Prod. LLC, 740 F. Supp.2d 207 (D. Mass. 2010) ("[T]he fact that [the source] was involved personally in the controversy does not make the defendants reckless for reporting the information obtained from him"). Nor does the fact that some four

(4) years after the articles were published the parties learned about an incident involving Delp's fiancée's sister render the articles published in March 2007 false, let alone retroactively supply evidence that the Herald published them at the time with the required high degree of awareness of their probable falsity. Bose Corp. v. Consumers Union, 466 U.S. 485, 512 (1984); Martin v. Roy, 54 Mass. App. Ct. 642, 648 (2002) (affirming exclusion of post-article emails on the issue of actual malice; "an email some four years after the publication of Roy's article was [not] relevant to a determination of Roy's state of mind at the time of publication of the article in 1993"); Secord v. Cockburn, 747 F. Supp. 779, 797 (D.D.C. 1990) ("[I]t is hornbook libel law that post-publication events have no impact whatsoever on actual malice…since the existence or non-existence of such malice must be determined at the date of publication").

V. THE SUPERIOR COURT CORRECTLY DISMISSED SCHOLZ'S INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM

Where a plaintiff suffered from pre-existing symptoms predating the damage allegedly caused by a defendant, he must demonstrate causation through admissible expert testimony--as opposed to his own per-

sonal belief--in order to avoid summary judgment. See, e.g., Theresa Canavan's Case, 432 Mass. 304, 316 (2000); Andrade v. Jamestown Hous. Auth., 82 F.3d 1179, 1187-1188 (1st Cir. 1996) (affirming dismissal of emotional distress claim where plaintiff, who had a host of pre-existing symptoms, provided no "expert medical testimony that her symptoms were in fact caused by" the defendant).

Scholz, who never saw a psychiatrist or counselor of any kind and disclaimed any emotional maladies in sworn documents submitted to the United States Government, claimed that his purported emotional distress from the articles manifested itself through precisely the same various physical and emotional symptoms from which he had suffered for years before the articles, including in the months immediately preceding their publication. The undisputed evidence from Scholz' own medical records and treating physicians established that these pre-existing symptoms were caused by a plethora of pre-existing chronic diseases, infections, injuries, and conditions.[15] It was also undisputed that

[15] None of Scholz' treating physicians could testify that there was any objective difference between Scholz' symptoms before the articles and his symptoms after them. Nor could they testify that anything the

after March 2007, but before he sued the Herald, Scholz asserted in various lawsuits, including under oath, that other individuals were the cause of his purported emotional distress. A1525-1528. Quite apart from the fact that dismissal of Scholz's emotional distress claim was warranted by dismissal of his defamation claim, dismissal of that claim was independently warranted.

VI. THE SUPERIOR COURT DID NOT ERR IN AWARDING ROUTINE DEPOSITION AND RELATED COSTS REASONABLY NECESSARY TO THE HERALD'S DEFENSE

In his effort to void the award of $132,000 in routine deposition and related costs that the Superior Court found to be reasonably necessary to the Herald's defense, Scholz argues that the deposition costs must be reasonably necessary to the summary judgment decision itself in order for them to be taxable.[16] He is incorrect. See, e.g., Mass. R. Civ. P. 54(e) (deposition costs are taxable "whether or not the deposition was actually used at the trial") (emphasis added); Federico v. Ford

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Herald did "caused" or worsened any of the pre-existing symptoms. A1451-1512, 1529-1534.

[16] However, the assessed costs included those associated with depositions that: (1) Scholz noticed and believed were necessary; (2) both parties noticed and used at summary judgment; and/or (3) the Herald used at summary judgment and that the court expressly relied on in entering summary judgment. A1798-1812.

Motor Co., 67 Mass. App. Ct. 454, 456 (2006) (in affirming costs, court rejected argument that deposition costs were unreasonable because defendant eventually settled and was released as a party).

CONCLUSION

For each of the foregoing reasons, summary judgment in favor of the Herald Parties should be affirmed as well as the Superior Court's award of routine costs in their favor.

Respectfully submitted,

Boston Herald, Inc., Gayle Fee and Laura Raposa,

By their attorneys,

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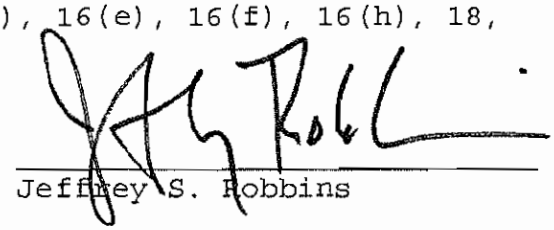
April 30, 2014

CERTIFICATE OF COMPLIANCE
PURSUANT TO MASS. R. APP. P. 16(k)

Pursuant to Mass. R. App. P. 16(k), I, Jeffrey S. Robbins, counsel for Appellees the Boston Herald, Inc. Gayle Fee, and Laura Raposa hereby certify that Appellees' brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to M.R.A.P. 16(a), 16(e), 16(f), 16(h), 18, and 20.



Jeffrey S. Robbins

CERTIFICATE OF SERVICE

I, Jeffrey S. Robbins, certify that, on behalf of Appellees the Boston Herald, Inc., Gayle Fee, and Laura Raposa, served copies of the foregoing brief via hand delivery on this 30th day of April 2014, to counsel for the Plaintiff-appellant at:

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