COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Docket No. SJC-11511

DONALD THOMAS SCHOLZ and
THE DTS CHARITABLE FOUNDATION, INC.
Plaintiffs/Appellants

v.

MICKI DELP,
Defendant/Appellee

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

BRIEF OF APPELLEE MICKI DELP

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ISSUES PRESENTED

1. Where none of the statements either made by defendant Micki Delp ("Micki") to the Boston Herald or arguably ascribed to her even mentioned plaintiff ("Scholz") and her statements referred not to Scholz but to the mental state of her former husband, Brad Delp ("Brad"), was the Superior Court correct in concluding that none of Micki's statements were "of and concerning" Scholz under governing Massachusetts law?

2. Where each of Micki's statements, as the Superior Court found, were "about Brad and his mental state at the time of his suicide," was the Superior Court correct in concluding that none of these statements was reasonably interpreted as defaming Scholz under governing Massachusetts law?

3. Was the Superior Court correct in concluding that Scholz, a public figure, had failed to adduce the Constitutionally-required "clear and convincing evidence" that when Micki made these statements she "in fact entertained serious doubts as to [their] truth," where (1) Scholz submitted no evidence that Micki in fact entertained serious doubts about the truth of any of her statements; (2) it was undisputed that Micki made her statements based on what Brad had indisputably told her before he took his life; and (3) it was undisputed that, to Micki's knowledge, Brad had made very similar statements to others of his closest friends before he committed suicide?

4. Although the Superior Court found that it did not need to reach the issue of whether any of Micki's statements were even actionable statements of fact as opposed to non-actionable expressions of her opinion about what her former husband was feeling at the time of his death, should summary judgment be upheld on the additional ground that Micki's statements were not objectively verifiable or provably true or false, and were therefore Constitutionally-protected expressions of opinion?

STATEMENT OF THE CASE

The lead singer of the band Boston, Brad Delp, took his life on March 9, 2007. On March 15, 2007, a Boston Herald reporter, Gayle Fee, interviewed Brad's former wife, Micki, who had known him for 30 years, had been married to him for 16 years and was the mother of his 2 children. Micki had remained close friends with Brad until his death, and had spoken to him at length just 8 days before he took his life. Brad left 4 private suicide notes: to Micki, to their children, to his fiancée and to his fiancée's sister. A784-785, 1074-1075.

During the interview, Ms. Fee asked Micki questions about her view of Brad's emotional condition at the time of his death, and Micki answered those questions. The next day, March 16, 2007, the Herald published an article containing 4 verbatim statements actually made by Micki to Ms. Fee, which it identified as her actual statements by the use of quotation marks. A811, 1072, 1074-1075. Micki's actual statements were listed by Judge Cratsley in his decision,[1] and were numbered by him:

[1] See A1644 - Memorandum of Decision ("Decision") at p.6.

> (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[2] 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 [Brad] 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."

Micki confirmed that she said each of the statements that the Herald quoted her as having made. A811, 1072, 1074-1075, 1649.

Ms. Fee, of course, and not Micki, wrote the introductory paragraph of the article, known as the "lead," in which Ms. Fee provided her own summary of the overall interview.[3] The lead did not purport to

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[2] Barry Goudreau and Sib Hashian, both friends of Brad, were original members of Boston who had left the band and who each had an acrimonious relationship with Scholz for many years, right up until Brad's death. A92 at ¶ 62; A768-787.

[3] A "lead" is defined as "the first summary or introductory section of a news story." Webster's Third New International Dictionary (2002).

quote Micki, and did not contain any quotation marks. Accordingly, Micki stated that she did not use the words used by the Herald in its lead.

However, because Scholz argued that there was a "dispute" over whether Micki could be held liable for the Herald's lead, even though the Herald did not purport to quote Micki, Judge Cratsley included the lead in his analysis and numbered it as well. The Herald's lead paragraph was as follows:

> (5) Boston lead singer Brad Delp was driven to despair after his long time friend Fran Cosmo was dropped from a summer tour, the last straw in a dysfunctional professional life that ultimately led to the sensitive frontman's suicide, Delp's ex-wife said.

A142, 1649.

Finally, the Herald, not Micki, wrote another sentence which summarized a portion of the interview in the Herald's words, not Micki's. The Herald used no quotation marks here either, signaling that these were not the words Micki used and, accordingly, Micki stated that these were not her words. Because Scholz again claimed that there was therefore a "dispute" as to whether Micki could be held liable for the Herald's sentence, Judge Cratsley included this sentence in his analysis and numbered it as well. It read:

(6) According to Micki Delp, Brad was upset over the lingering bad feelings from the ugly breakup of the band Boston over 20 years ago.

In October, 2007, Scholz (and his personal foundation) sued Micki, her sister, Connie Goudreau, and a "Jane Doe," alleging that they had all defamed them, civilly conspired against them and interfered with their advantageous relations by Micki's statements to the Herald and by their alleged statements on the Internet and to various third parties.[4] A076-119.

In the deposition taken of her by Scholz, Micki confirmed that she had indeed made each of the statements that the Herald quoted her as having made, which were Statements 1-4. She stated that she had not used the words contained in the Herald's lead (Statement 5) or in Statement 6. A658-666, 668-673. Thereupon,

[4] As the Superior Court pointed out, neither Scholz nor his foundation submitted evidence in support of their civil conspiracy or interference claims against Micki, or in support of any of his defamation theories based on purported statements on the Internet or to third parties other than the Herald. Accordingly, the Superior Court deemed such claims waived. Decision at 1 n.5. Neither Scholz nor his foundation challenge this decision on appeal, with the result that the only issue on appeal is whether the Court erred in granting summary judgment on the remaining defamation claim, which is based solely on Micki's statements to the Herald published on March 16, 2007. Kaltir v. Longwood Sec. Services, 76 Mass. App. Ct. 1120 (2010) (failure to raise issue in appellate brief results in waiver).

Scholz filed a separate lawsuit against the Herald in March, 2010, alleging that because Micki had not used the words in the Herald's lead or in Statement 6, the Herald had "fabricated" its articles, and had defamed Scholz. A042.

The two cases were consolidated, and were specially assigned to Judge Cratsley. By the time Scholz filed his lawsuit against the Herald, discovery in his case against Micki had closed, and in April, 2010, Micki moved for summary judgment. A009, 1646.

Before any hearing on Micki's motion took place, it emerged that Scholz had withheld or redacted hundreds of emails and other documents requested by Micki during discovery. Accordingly, on September 11, 2010, Micki filed a motion to dismiss Scholz' case as a sanction for having withheld these documents, as well as a motion for leave to file supplemental materials in support of her motion for summary judgment. Under the circumstances, Scholz agreed to permit Micki to file these supplemental materials. The Court provided Scholz the opportunity to respond, and proceeded to afford both parties repeated opportunities to supplement the summary judgment record with legal memoranda and evidence obtained in the course of discovery in

Scholz' lawsuit against the Herald. A1646-1647.

On May 13, 2011, Scholz asserted to the Superior Court that, in connection with his lawsuit against the Herald, he had uncovered "significant evidence that establishes, without any doubt, the true reason why Brad Delp committed suicide," and asked the Superior Court to delay ruling on Micki's motion for summary judgment until his lawyers could take additional depositions in his case against the Herald. The Court agreed to delay its ruling. A1537, 1558, 1647.

Judge Cratsley afforded the parties hearings on Micki's motion on October 26, 2010, April 25, 2011 and June 6, 2011. He issued his Memorandum of Order and Decision on Micki Delp's Supplemental Motion for Summary Judgment on August 19, 2011, ruling that Micki was entitled to summary judgment on each of the statements made by her, or attributed to her, on 3 independent bases.[5] In so doing, he addressed Scholz' claim that there was a "dispute" as to whether Micki had "said" Statements 5 and 6. The Court did so by listing the four actual quotes which Micki had con-

[5] The Court, which dismissed Scholz' complaint in its entirety pursuant to Mass. R. Civ. P. 56, did not rule on Micki's motion to dismiss Scholz' complaint as a sanction for the withholding and whiting-out of the documents requested by her during discovery.

firmed were stated by her verbatim (Statements 1-4), the Herald's lead (Statement 5) and the Herald reporter's description of what Micki had conveyed (Statement 6). It noted:

> Micki denies that she made the last two statements. For purposes of this summary judgment motion, however, the Court, considering the facts in the light most favorable to Scholz as the non-moving party, assumes that Micki made the statements.

Decision at 6 n.8 (emphasis supplied).[6]

First, the Court examined each of the 6 statements in light of Massachusetts law requiring that, in order to be actionable, statements must actually be

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[6] Scholz nonetheless repeatedly argues that there was a "dispute" as to whether Micki had actually "said" Statements 5 and 6 and that this precluded summary judgment. See, e.g., Brief at p.3 ("[T]here was significant conflicting evidence. While Ms. Delp insists that she did not say some of the things that the Herald attributed to her, the Herald's reporter insisted that the article accurately reflected what Ms. Delp said...It's for the jury, not the Court, to decide who libeled Mr. Scholz."), p.19 ("On summary judgment, the Court was obliged to give full credit to the Herald reporter's affidavit insisting that the article fairly reflected Ms. Delp's comments.") and p.23 ("There was a triable issue about whether the Herald in fact placed innocent words into a defamatory context or whether the context fairly reflected Ms. Delp's comments."). Of course, there was no "dispute," no "conflict" and no "triable issue"; the Court expressly announced that it was treating Statements 5 and 6 as though Micki had actually said them, and expressly conducted the analysis mandated by Massachusetts law with respect to those statements in addition to Statements 1-4. Scholz' argument, therefore, simply ignores the Superior Court's decision.

"of and concerning" the plaintiff. Where none of Micki's statements mentioned Scholz, and all were, as the Superior Court found, "about Brad and his mental state at the time of his suicide," none of the statements attributed to Micki survived that test. Decision at p.10.

Second, and for similar reasons, the Court found that none of the 6 statements was "reasonably susceptible of a defamatory meaning as to Scholz." It observed that Scholz' reliance on the Herald's headline for the March 16, 2007 article, or the Herald article as a whole or in combination with other Herald articles, or commentary by others about the media coverage of Brad's suicide, was irrelevant to an analysis of what Micki said. Decision at p.8, citing Eyal v. Helen Broad. Corp., 411 Mass. 426, 433-434 (1991).

Third, the Court correctly observed that Scholz, a public figure, was required to "show, by clear and convincing evidence, that Micki acted with actual malice, that is, that Micki made each statement with knowledge of its falsehood or with reckless disregard for whether it was false." Decision at 10-11, A1075. It found that Scholz had not submitted evidence demonstrating that Micki had in fact made any of these

statements while entertaining serious doubt as to their truth. The Court noted that, under the governing law, evidence that Micki disliked or even hated Scholz did not constitute evidence that she entertained serious doubts about the truth of her statements, citing Rotkiewicz v. Sadowsky, 431 Mass. 748, 755 (2000) ("In the context of defamation, the term 'actual malice' does not mean the defendant's dislike of, hatred of, or ill-will toward the plaintiff... The inquiry is a subjective one as to defendant's attitude toward the truth or falsity of what she said, rather than her attitude toward the plaintiff"). See also Pircio v. Toland, 53 Mass. App. Ct. 1101, at *1 (2001) (Rule 1:28 Decision) (Affirming summary judgment; "the plaintiff misapprehends the meaning of malice in the context of defamation. It does not mean spite or ill will toward the plaintiff").

Finally, Micki had argued that each of her statements was manifestly non-actionable opinion, rather than a statement of objectively verifiable, provably-false fact, citing Massachusetts authority that included a recent decision of this Court applying that rule to facts comparable to the instant ones. See, e.g., Driscoll v. Bd. of Trs. of Milton Academy, 70

Mass. App. Ct. 285, 296 (2007)(affirming Rule 12(b)(6) dismissal of defamation claim because statement that boys "pressured" or "coerced" girl to perform sexual acts was non-actionable opinion). The Court found that it did not need to address this argument, however, because it had already granted Micki's motion for summary judgment on three other grounds. A1655, fn.9.

STATEMENT OF FACTS

The summary judgment record before Judge Cratsley included the following undisputed facts.[7] At the time Brad took his life, Micki had known Brad for 30 years,

[7] Scholz argued to the Superior Court that these facts were "disputed", but given Scholz' failure to submit evidence meeting the requirements of Mass. R. Civ. P. 56(e), they were not. See Lalonde v. Eissner, 405 Mass. 207, 209 (1989) (Party opposing summary judgment cannot rely on "mere assertions of disputed facts to defeat the motion."). First, there was no genuine dispute about the actual statements made by Micki or arguably ascribed to her, because Judge Cratsley considered all of them in his analysis. Second, there was no genuine dispute that Micki based her statements on what Brad told her before he took his life, or about what Brad told her, because Micki's testimony about her conversations with Brad was uncontradicted by admissible evidence. A811-818, 1072-1075.

Third, there was no genuine dispute that Micki also was aware of what Brad had told others of their friends, because Micki's testimony that she was aware of it was similarly uncontradicted. Finally, there was no genuine dispute about what Brad told these other friends of theirs before he died because their testimony about what Brad told them likewise stands uncontradicted. A623-627, 656-657, 669-673, 788-810, 1075, 1274-1418.

had been married to him for 16 years and had remained close to him right up until the time of his death. They spoke regularly on the phone, including on February 28, 2007, just over a week before his suicide, and Brad left Micki a private note before he took his life. A655-658, 784-785, 1074-1075, 1267-9.

Brad, who suffered from panic attacks, tried to avoid confrontation, in his words, "like the plague"; as Scholz himself put it, Brad was "passive and studiously non-confrontational." A0788-789. Not long before Brad took his life, after Scholz, according to Brad, had acted in a way that intentionally hurt Brad's close friends, Brad called Micki and was "extremely upset." He told her that he was going to quit the band Boston, but was "terrified" that Scholz, the founder, would sue him, as Scholz had sued others. He told her that Scholz had done "the same old thing" as he had done in the past, that Brad was "humiliated," "embarrassed," and "extremely remorseful" at what had been done to his friends, former members of the band named Barry Goudreau and Sib Hashian who had had an acrimonious relationship with Scholz for many years. Brad and Goudreau were close friends and brothers-in-law and worked together on musical projects; Brad and

Hashian were likewise close friends and Brad was the godfather of Hashian's daughter.[8] A624-626, 647, 656-657, 669, 671-673, 787.

Micki had long had discussions with Brad about Scholz, and had observed Scholz' treatment of Brad and the other bandmembers. For example, she had observed Scholz screaming at the band while on tour, including yelling that he would "send them back to the bars" and "fire" them. She observed Scholz scream at Brad in front of other people, telling him on one occasion "if you ever hit another note like that again, I will take your mic and throw it into the crowd." Micki often told Brad to "speak up" about issues relating to Boston that upset him, and even offered to speak up for him if he could not. However, Brad urged her not to say anything to Scholz, telling her "it will just make it harder on me." Brad told Micki on numerous occasions that he was "terrified" of Scholz and afraid of saying something that would upset Scholz. In November, 2006, Brad told Micki "I just try to do my job, keep my head down, stay out of Tom's line of fire, and

[8] As Scholz concedes, "[w]ell-chronicled past differences between Mr. Scholz, on the one hand, and Messrs. Goudreau and Hashian, on the other, resulted in a complete breakdown of any relationship between the former bandmates." A787 at ¶ 5.

just do my job," but "I can't anymore, and I'm quitting." A620-626, 656-657, 671, 813-818.

Brad also told Micki that he had been informed by telephone that there was to be a rehearsal for what was to be a 2007 tour of Boston, and that his longtime friend, Fran Cosmo, had been "disinvited" from the tour. Brad had described Cosmo as his "lifeline" in the band, and told friends that he felt that he "needed" Cosmo to sing high notes and otherwise help relieve Brad of performance-related pressures that he felt on tour. Brad told Micki that "he was upset" by that. A326, 646, 670, 1078-1079, 1082, 1182, 1192.

Micki's statements to the Herald after Brad took his life were based on what Brad himself told her, and on what she personally observed. However, she was also aware of what Brad had told other friends of theirs before he died, and her views about what Brad was feeling at the time of his death were also based on what she was aware Brad had told those individuals. A813, 1074-1075, 1076-1203, 1273-1423.[9] Judge Cratsley

[9] Micki testified that in her interview with the Herald, "I expressed my opinion about the pressures that I believed then - and believe now - Brad was feeling...I expressed these opinions based on conversations that I had with Brad, and statements that he made to me, in late 2006 and early 2007, and in con-

had before him the uncontradicted testimony from Micki that she was aware of what Brad had told his friends Bill Faulkner, Steve Frary, and others. A1074-1075. She submitted those individuals' testimony about what Brad had told them shortly before he died to the Superior Court; their testimony about what Brad told them was also uncontradicted.

Thus, it was undisputed that in the last few months of his life, "all [Brad] spoke about [to Bill Faulkner] in terms of stress was the Boston-related stress, the tours and such", that Brad told Faulkner in the last several months of his life that he was "very upset" about Fran Cosmo being "out of the band," and that Brad had spoken to Faulkner "a dozen or more" times about being "despondent" over Cosmo being fired from the band. In their last conversation, on March 7, 2007, just hours before he took his life, Brad spoke to Faulkner about the upcoming tour and Cosmo. It was undisputed that Brad told Faulkner "many times" about his fear of confronting Scholz and his feeling that

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versations that I had with him for several decades, as well as my own observations from before we were married, during the 16 years we were married, and after we were married...I know that Brad told others that were very close to him some of the same things that he told me." A1074-1075.

Scholz was "a bully," and Brad that told him that "he wanted to quit the band, but he was afraid to because he was he was afraid Tom would make his life miserable." Brad also told Faulkner about the relationship between Scholz and the former members: "It's driving me nuts and I can't handle the tension between the two sides." A1083, 1100-1104, 1106-1107, 1288-1352.

It was also undisputed that Brad told Steve Frary in late 2006 that he was "dreading" going on tour with Boston in 2007, and "didn't know how he was going to do it for a whole tour" without Fran Cosmo. In discussing Scholz' conduct toward the original members, Brad described Scholz as an "[expletive]." Brad said that he was very depressed about his situation with Boston, that events surrounding the band in late 2006 were "driving him crazy" and that he was quitting Boston. A1177, 1181-1182, 1184-1185, 1192, 1194-1195, 1197-1199, 1201-1203, 1362-1372.

The Court also had the uncontradicted testimony of Brad's fiancée, Pamela Sullivan, who testified, inter alia, that Brad told her that "ongoing issues relating to the band Boston caused him distress," that he "felt caught in the middle of [the] bitter relationship between Scholz, on one hand, and Goudreau,

Hashian and Sheehan on the other," that he was upset that Fran Cosmo was not going to be on the 2007 tour, and that Brad did not want to participate in the 2007 tour, but "felt, in effect, as though he were not in a position to say no." A1076-1079, 1274-1288.

The Court also had before it the uncontradicted testimony of Pamela Sullivan's sister, Meg, that Brad confided in her, inter alia,

> how much he hated being a part of Boston, how he was embarrassed to be associated with them...He said he wanted to quit Boston finally...He was finally going to stop being such a wimp, in his words, and stand up to Tom...The things we talked about most were his depression, how moody he was, and his absolute disdain for Boston and Tom...[and]the panic attacks that he would get when he was on the road with Boston.

A1592-1593; see also A1559-1569, 1591-1617.

SUMMARY OF ARGUMENT

This Court has repeatedly reaffirmed that summary judgment is favored in defamation cases. LaChance v. Boston Herald, 78 Mass. App. Ct. 910, 910-911 (2011) (Affirming summary judgment); Salvo v. Ottaway Newspapers, Inc., 57 Mass. App. Ct. 255, 259 (2003) (Reversing denial of summary judgment). See Dulgarian v. Stone, 420 Mass. 843, 846 (1995) (Affirming summary judgment; "summary judgment procedures are especially

favored in defamation cases").

Judge Cratsley conducted precisely the analysis mandated by Massachusetts law: taking each of the statements actually made by Micki or arguably attributable to her, and then applying the specific legal tests to each of those statements. In so doing, he carefully examined the statements - not Scholz' characterization of what the Herald article reporting those statements "conveyed," not the Herald headline and not Scholz' recasting of those statements by in effect rewriting them. Scholz' appeal, like his complaint, is based on the theory that statements which do not even mention him, and which manifestly are Micki's views of her deceased former husband's state of mind, were instead statements "that the plaintiff, Donald Thomas Scholz, had, as a matter of fact, caused her ex-husband, Brad Delp, to commit suicide." Appellant's Brief ("Brief") at p. 1. (Infra at 27-50).

The Superior Court reviewed Micki's statements, accorded them their plain and natural meaning, and found that they were no such thing. It was plainly correct in so finding. Eyal, 411 Mass. at 433 (Summary judgment for defendant); Damon v. Moore, 520 F.3d 98, 103-105 (1st Cir. 2008) (Affirming dismissal of

libel claim predicated on "forced or strained construction of the statement"); Amrak Prods., Inc. v. Morton, 410 F.3d 69, 71-73 (1st Cir. 2005)(Affirming dismissal of defamation claim, where plaintiff's interpretation of statement "requires the Court to pile inference upon innuendo, innuendo upon stereotype").

First, the Superior Court correctly concluded that none of the statements actually made by Micki or ascribed to her were "of and concerning" Scholz under the governing law. None of Micki's statements mentioned Scholz, and none of her statements referred to Scholz. Given their plain and natural meaning, as the Superior Court found, Micki's statements "are about Brad and his mental state at the time of his suicide," not about Scholz. Elm Med. Lab., Inc. v. RKO Gen., Inc., 403 Mass. 779, 785 (1989) (affirming dismissal of defamation claims because plaintiff's contention that statements were "of and concerning" them was unreasonable in the context of the broadcasts); Driscoll, 70 Mass. App. Ct. at 298-99 (Affirming dismissal of claim where statement did not even mention the plaintiff, referring instead to a group of individuals); Dexter's Hearthside Rest., Inc. v. Whitehall Co., 24 Mass. App. Ct. 217, 219 (1987) (affirming Rule

12(b)(6) dismissal because "publishing the name 'Dexter's Hearthside Rest.' for inclusion on the ABCC delinquent accounts list cannot reasonably be interpreted as referring to Dexter as an individual"). (Infra at 27-30).

Second, the Superior Court was correct in concluding that, where Micki's actual statements and the statements ascribed to her did not even mention Scholz, and were manifestly about Brad Delp's fragile mental state at the time he decided to take his life, they were not reasonably susceptible of a defamatory meaning as to Scholz, as a matter of law. Foley v. Lowell Sun Publ'g Co., 404 Mass. 9, 11 (1989) (Affirming dismissal of defamation claim where communication could not reasonably be construed as defamatory); Ellis v. Safety Ins. Co., 41 Mass. App. Ct. 630, 635 (1996). Scholz' argument below and on appeal relied not on Micki's statements, but instead on his characterization of the March 16, 2007 Herald article within which those statements appeared, the headline given to the article by the Herald and anonymous Internet postings about some combination of Herald articles on different dates, or other articles, or about media coverage of the articles. (Infra at 30-33).

The Superior Court correctly applied the governing law requiring that the legal analysis be of the actual statements, not others' characterization of them. Eyal, 411 Mass. at 433-434 (whether reports in the media focused on the corporation is legally irrelevant; "the broader and more intensive commentary done by others on the story, cannot serve to make the [defendants'] statement capable of a defamatory meaning if the defendants' words themselves have no application to the corporation")(emphasis supplied); Foley, 404 Mass. at 11 (The communication must be "interpreted reasonably"); Lambert v. Providence Journal Co., 508 F.2d 656, 659 (1st Cir. 1975)(Affirming dismissal; "innuendo cannot be used to enlarge the natural meaning of the words actually used"). (Infra at 31-33).

Third, the Court correctly found that Scholz, a public figure, had failed to satisfy the Constitutional requirement of submitting "clear and convincing evidence" that Micki had made her statements while in fact entertaining serious doubts about the truth of the statements that she made. Lane v. MPG Newspaper, 438 Mass. 476, 485 (2003) (Affirming summary judgment against public figure); Netherwood v. AFSCME, 53 Mass. App. Ct. 11, 20 (2001) (Affirming summary judgment;

plaintiff "failed to show an ability to prove at trial by clear and convincing evidence that the newspaper had published the subject articles with actual malice"); Howard v. Antilla, 294 F.3d 244, 252 (1st Cir. 2002) (Vacating defamation judgment for plaintiff; "the standard of actual malice is a daunting one"). (Infra at 33-45).

The Court correctly ruled that Scholz was required to adduce clear and convincing evidence that each of the statements by Micki that he claimed "defamed" him were uttered by her while entertaining serious doubts about its truth or falsity. Murphy v. Boston Herald, 449 Mass. 42, 48-49 (2007). It also correctly applied the well-established rule that evidence that Micki disliked Scholz was legally irrelevant for the purpose of establishing that she made the statements while seriously doubting their truth. Rotkiewicz, 431 Mass. at 754-5 (Actual malice inquiry "is a subjective one as to the defendant's attitude toward the truth or falsity of the statement rather than the defendant's attitude toward the plaintiff")(emphasis supplied); Netherwood, 53 Mass. App. Ct. at 18 ("actual malice does not mean the defendant's dislike of, hatred of, or ill will toward, the plaintiff"); Shaari

v. Harvard Student Agencies, Inc., 427 Mass. 129, 131 (1988) ("only those false statements made with [a] high degree of awareness of their probable falsity" may support a defamation claim by a public figure).

Here, Scholz not only failed to meet the "daunting" standard of submitting clear and convincing evidence that Micki made her statements about Brad's state of mind with a "high degree of awareness of their probable falsity," but failed to submit any such evidence. Indeed, Scholz could not dispute Micki's testimony that her views were based on what Brad himself had told her in the months before he took his life. Nor was Scholz able to dispute Micki's testimony about what it was that Brad had told her about what he was feeling, including her undisputed testimony that Brad had told her that (1) Scholz' treatment of former Boston band members, had left him "humiliated," "embarrassed" and "extremely upset"; (2) Brad was trying to quit the band and sever his relationship with Scholz, but was "terrified" of Scholz and afraid that Scholz would sue him as he had sued numerous band members and other professionals associated with the band; (3) Scholz' history of berating Brad had left him feeling hurt and humiliated; (4) Brad had felt embar-

rassed to be on the last Boston tour; and (5) Brad was upset that his close friend and bandmate Fran Cosmo, on whom Brad had relied to perform for years, had been dropped from the band shortly before an upcoming Boston tour which Brad wanted to avoid. (Infra at 36-38).

Scholz was likewise unable to dispute that, apart from what Brad had directly told her, Micki was aware that Brad had told other close friends about his of his feelings about Scholz, Boston and the upcoming Boston tour in very strong terms -- terms that were much, much harsher than anything Micki expressed to the Herald, or anything the Herald published. (Infra at 38-39). For all of these reasons, Judge Cratsley was correct in ruling that Scholz' defamation claim could not survive summary judgment on this additional ground. Milgroom v. News Group Boston, Inc., 412 Mass. 9, 11-12 (1992) (Affirming summary judgment; plaintiff failed to demonstrate by clear and convincing evidence that defendant entertained serious doubts as to the truth of the statement). (Infra at 33-45).

Fourth, although the Superior Court found that it did not even need to reach Micki's argument that her statements were non-actionable expressions of opinion rather than statements of objectively verifiable fact

because it had granted summary judgment for Micki on 3 other grounds, summary judgment should be affirmed on that additional ground. Vaughan v. Eastern Edison Co., 48 Mass. App. Ct. 225, 226 (1999). A statement must be "objectively verifiable" and "provably false" in order to be actionable under the First Amendment. Milkovich v. Lorain Journal Co., 497 U.S. 1, 19-20 (1990); Veilleux v. Nat'l Broad. Co., 206 F.3d 92, 108 (1st Cir. 2000) ("only statements that are 'provable as false' are actionable"). (Infra at 45-50).

The views expressed by Micki about what she felt Brad was feeling before he took his life are inherently incapable of being proved false or true. As the First Circuit has put it:

> 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, the statement is not actionable.

Gray v. St. Martin's Press, Inc., 221 F.3d 243, 248 (1st Cir. 2000) (Statement that plaintiff "faked" close relationship with government officials and had "failed" in business held not actionable). See Cole v. Westinghouse Broad. Co., 386 Mass. 303, 311 (1982) (phrases 'sloppy and irresponsible reporting' and 'history of bad reporting techniques,' "when viewed in

their context, could not reasonably be viewed as statements of fact").

Scholz' "characterization" of Micki's actual statements as assertions that he "pressured Brad into committing suicide," quite apart from being an invention, cannot save his claim, as a recent decision by this Court makes clear. Driscoll, 70 Mass. App. Ct. at 296 (upholding the dismissal under Rule 12(b)(6) of claims based on statements that a student "pressured" or "coerced" a girl into performing sexual acts, ruling that such statements were non-actionable opinion). (Infra at 48-49).

Finally, even had Micki stated that Scholz was the reason Brad took his life, which she did not, such a statement would also be inherently incapable of being objectively verified, as a recent decision of the Eighth Circuit that is directly on point illustrates. Gacek v. Owens & Minor Distribution, Inc., 666 F.3d 1142, 1147 (8th Cir. 2012) (Affirming summary judgment; statement that plaintiff "was the reason for Bill's death" and "pushed [the deceased] over the edge" were non-actionable; "none of these statements, however, express 'objectively verifiable facts' about Showers' decision process. Rather, they express [de-

fendants'] 'theory' or 'surmise' as to Showers' motives in taking his own life"). (Infra at 49-50).

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY FOUND THAT NONE OF MICKI'S STATEMENTS WERE "OF AND CONCERNING" SCHOLZ

"[I]t is a fundamental principle of the law of defamation that a plaintiff must show, inter alia, that the allegedly defamatory words published by a defendant were of and concerning the plaintiff." Godbout v. Cousens, 396 Mass. 254, 263 (1985) (Affirming dismissal of defamation claims because allegedly defamatory words were "of and concerning" plaintiff's mother, not the plaintiff). Whether any of Micki's statements were "of and concerning" Scholz was a question of law for the court. Eyal, 411 Mass. at 434; Elm Med. Lab., Inc., 403 Mass. at 785 (affirming dismissal of defamation claims where plaintiffs' allegation that statements were "of and concerning" them was unreasonable in context of broadcast); Driscoll, 70 Mass. App. Ct. at 298-99 (affirming dismissal under Rule 12(b)(6) where plaintiff not even mentioned).

As the Superior Court noted, Scholz was required to demonstrate "either that [Micki] intended [her] words to refer to the plaintiff and that they were so

understood, or that [Micki's] words reasonably could be interpreted to refer to the plaintiff and that [she] was negligent in publishing them in such a way that they could be so understood." Decision at 9, citing New England Tractor-Trailer Training of Conn., Inc. v. Globe Newspaper Co., 395 Mass. 471, 483 (1985). Scholz submitted no evidence that Micki intended any of these 6 statements to refer to Scholz and, to the contrary, the only evidence from her on her intent was her denial that she was blaming Scholz for Brad's decision to take his life. A219. Nor did Scholz submit any admissible evidence that anyone understood Micki's actual statements to refer to Scholz; instead, he invoked inadmissible Internet postings reflecting that anonymous people themselves blamed Scholz, or regarded either the Herald headline or Herald articles in general, or other media commentary, as blaming Scholz. See Mass. R. Civ. P. 56(e).

The Superior Court properly found that none of Micki's statements were of and concerning Scholz; rather, and on their very face, as the Court found, "Micki's six statements are about Brad and his mental state at the time of his suicide." Scholz takes considerable pains to avoid judicial focus on Micki's

statements, preferring to change the subject to the Herald's headline or the Herald article or articles. But Micki did not mention Scholz. None of her statements refer to Scholz by name "or in such a manner as to be readily identifiable" as fingering Scholz. New England Tractor-Training, 395 Mass. at 480.

Micki's view that "it got to the point where he just couldn't do it anymore" (Statement 2) is not reasonably construed as a reference to Scholz. Nor is Statement 6, that "Brad was upset over the lingering bad feelings from the ugly breakup of the band," which is simply an observation about Brad's reaction to "bad feelings" about the dissolution of a 5-person band. See Driscoll, at 70 Mass. App. Ct. at 298-99 (defendant's statement referred to a group of individuals, and did not name plaintiff). As for Statement 5, this is plainly an observation about Brad's fragile mental state regarding an event which is not attributed to Scholz, in a sentence which does not mention Scholz, but which refers to a "dysfunctional professional life," which also does not identify Scholz in any way.

In short, the Court correctly found that there is no "reasonable interpretation of any of Micki's statements which permits the inference that Micki was re-

ferring to Scholz." Decision at 10. Moreover, even assuming that any of Micki's statements could reasonably be construed as referring to Scholz, he submitted no evidence "that [Micki] was negligent in publishing them in such a way that they could be so understood," New England Tractor-Trailer, 395 Mass. at 483, and, therefore, Scholz failed to meet the "of and concerning" test for that additional reason.

II. THE SUPERIOR COURT CORRECTLY RULED THAT NONE OF MICKI'S 6 STATEMENTS WERE REASONABLY SUSCEPTIBLE OF A DEFAMATORY MEANING AS TO SCHOLZ

The Superior Court also correctly concluded that none of Micki's 6 statements were "reasonably susceptible of a defamatory meaning as to Scholz." Decision at 7. It correctly observed that the question of whether Micki's statements are reasonably construed as imputing defamatory wrongdoing to Scholz is a question of law for the Court. Foley, 404 Mass. at 11-12 (1989) (Affirming dismissal of defamation claim because communication could not be reasonably construed as defamatory); Rest. 2d Torts, § 614 (1977) (Court decides whether communication is capable of a particular meaning, and whether such meaning is defamatory.)

Both before the Superior Court and here, Scholz obscured or altogether buried what Micki had said, and

instead constructed an argument that her statements should be analyzed not with reference to her actual words, but with reference to what Scholz believes Micki believed, or what he believes the Herald articles conveyed. Put simply, Micki did not state that Scholz was responsible for Brad's decision to take his life, or that Scholz caused Brad to kill himself, or any other characterization of Micki's words that is not found in what she said. Therefore, Scholz' heated, repeated argument that Micki stated that he was responsible for Brad's suicide is simply the heated, repeated invocation of a "straw man." As this Court has put it, a plaintiff's "personal belief that the statements would have been interpreted as defamatory does not suffice to create a triable issue." Chadbourne v. Astra Pharm., L.P., 63 Mass. App. Ct. 1119, at *2 (2005)(table decision).

The Court properly focused on Micki's words, an analysis which Scholz has somewhat energetically sought to avoid. See Murphy, 449 Mass. at 49 ("As a baseline proposition, the reviewing Court must examine the content of the statements, and the circumstances under which they were made...")(emphasis supplied). Plaintiffs cannot escape dismissal of their defamation

claims by urging interpretations of statements which are forced or strained. Foley, 404 Mass. at 11-12. Scholz argues that it should be given to a jury to decide whether Micki's statements should be construed as blaming him for Brad's death, when the statements do not mention Scholz and plainly say no such thing. See Lambert, 508 F.2d at 659 (Affirming dismissal of defamation claims; "innuendo cannot be used to enlarge the natural meaning of the words actually used"); Salvo, 57 Mass. App. at 262-263 (Reversing denial of summary judgment; the "gist of the article does not impute defamatory wrongdoing to the plaintiff. Rather, the article provides substantially correct facts...leaving it up to the readers to draw their own conclusions").

Here, Micki did not mention Scholz. The "natural meaning of the words actually used" by her, as the Superior Court found, expressed her view of Brad's fragile emotional condition and of his diminished mental state. None of her words accused Scholz of any form of wrongdoing, whether legal or moral; indeed, none of her words accused Scholz of doing anything. Accordingly, the Court was correct to analyze the words actually used by Micki, and to conclude that none of these statements were reasonably construed as imputing

defamatory wrongdoing to Scholz. See Boyle v. Cape Cod Times, 81 Mass. App. Ct. 1107, at *1(2012)(Rule 1:28 Decision)("The appropriate inquiry here in whether a reasonable reader would have understood the statements as connecting Boyle to the murder. Because no reasonable reader could do so, the defendants' motion for summary judgment was properly allowed").

III. THE SUPERIOR COURT CORRECTLY CONCLUDED THAT SCHOLZ HAD FAILED TO ADDUCE THE CONSTITUTIONALLY-REQUIRED CLEAR AND CONVINCING EVIDENCE THAT MICKI HAD MADE ANY OF HER STATEMENTS WHILE ENTERTAINING SERIOUS DOUBTS ABOUT THEIR TRUTH

Where Scholz is concededly a public figure, he bore the Constitutional burden of adducing evidence that showed that Micki made her statements "with a high degree of awareness of [their] probable falsity." St. Amant v. Thompson, 390 U.S. 727, 730 (1968) (reversing judgment for plaintiff); Shaari, 427 Mass. at 131 ("only those false statements made with [those] high degree of awareness of their probable falsity" may support a defamation claim by a public figure). Our courts regularly affirm - - and require - - that summary judgment be granted where public figures fail to adduce the requisite "clear and convincing evidence" demonstrating that the defendant actually made her statement while "in fact entertain[ing] serious

doubts as to the truth" of what she said. Lane, 438 Mass. at 485 ("Lane could not sustain this burden" of "prov[ing] by convincing clarity that the defendants published the allegation of water theft knowing that the allegation was false or recklessly disregarding whether it was false"); Netherwood, 53 Mass. App. Ct. at 20 (Affirming summary judgment; plaintiff "failed to show an ability to prove at trial by clear and convincing evidence that the newspaper had published the subject articles with actual malice"). See also Nat'l Ass'n of Gov't Emps., Inc. v. Cent. Broad. Corp., 379 Mass. 220, 232 (1979) (Reversing denial of summary judgment notwithstanding evidence that defendant was hostile to plaintiff and working against it; "it has been repeatedly observed that [hostility] does not approach a showing of the mordant unconcern with the truth of the particular statement which is crucial to the claim of defamation by a public figure").

As the First Circuit put it earlier this year, the First Amendment "bars public figures from recovering damages under state defamation laws unless they show that the defamer acted with 'actual malice.'" Schatz v. Republican State Leadership Committee, 669 F.3d 50, 52 (1st Cir. 2012) (Affirming dismissal of

defamation claim under Rule 12(b)(6) for failure to plead facts capable of meeting Constitutional "actual malice" standard) (citations omitted). Courts have described this standard as "daunting," Howard, 294 F.3d at 252, and "formidable." Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 666-67 and n.7 (1989). As Judge Cratsley correctly observed, he was required to examine any purportedly defamatory statement that qualified as "of and concerning" Scholz separately to determine whether, for each otherwise actionable statement, "the record establishes actual malice with convincing clarity." Murphy, 449 at 49.

Although Scholz insists that Micki "was out to get him," Brief at p. 3, felt "naked hatred" and "animosity" toward him and displayed "calculated vengeance," Id. at 48-50, it is black-letter law that "common-law malice," as Scholz characterizes it, does not equate to clear and convincing evidence that Micki in fact entertained serious doubts about the truth of her statements. Rotkiewicz, 431 Mass. at 755-57 ("The inquiry is a subjective one as to the defendant's attitude toward the truth or falsity of the statements, rather than the defendant's attitude toward the plaintiff"); Pircio, 53 Mass. App. Ct. 1101, at *1("The

plaintiff misapprehends the meaning of malice in the context of defamation. It does not mean spite or ill-will toward the plaintiff."). See Nat'l Ass'n of Gov't Emps., 379 Mass. at 232 (reversing denial of summary judgment despite plaintiff's submission of evidence that defendant was hostile to him).

Scholz bore the burden to submit "clear and convincing evidence" that Micki made these statements with that high degree of awareness of their probable falsity, defined as evidence that was "strong, positive and free from doubt." Callahan v. Westinghouse Broad. Co., 372 Mass. 582, 584, 587-588 n.3 (1997). Despite this burden, Scholz adduced no evidence that Micki had any "awareness" of the "probable falsity" of what she said. To the contrary, the evidence was undisputed that Micki made her statements with a sincere and well-grounded belief that they were true. A1075.

First, Micki's testimony was that she had made these statements based on her 30-year relationship with Brad, including a 16-year marriage and a close friendship established by the undisputed facts that (a) they spoke regularly on the phone right up until the end of his life; (b)Brad called her and they had a lengthy conversation just 8 days before he took his

life; and (c) long after the end of their marriage, Brad left her a private suicide note. A312-313, 815-818, 1074-1075.

Second, it was undisputed that, quite apart from Micki's own observations of Brad during the course of their long relationship, Brad had told her things shortly before he took his life which fulsomely supported her statements to the Herald, and her testimony that it was these conversations that formed the basis for the views she expressed was likewise undisputed. Scholz himself described Brad as "passive and studiously non-confrontational," and it was undisputed that Brad had told Micki in the last months of his life that he was "extremely upset," "embarrassed," and "humiliated" about things that Scholz had done, and that he wanted to quit the band but was "terrified" of Scholz. It was undisputed that Brad had told her that although he was trying to "keep my head down, stay out of Tom's line of fire and just do my job," that "I can't anymore, and I'm quitting." It was also undisputed that Brad had told her that he was "upset" about his longtime friend and bandmate Fran Cosmo being dropped from the upcoming Boston tour. A214, 623-627, 656-657, 669-673, 788, 816-818, 1072, 1074-1075.

Each of these statements made by Brad to her, especially against the backdrop of Micki's observations of Scholz' treatment of Brad and Brad's reaction to that treatment, more than amply supported Micki's rather benign statements to the Herald about her views of Brad's emotional condition. In short, even though it was Scholz' burden to adduce evidence that Micki made her statements with a high degree of awareness that they were probably false, Micki affirmatively demonstrated by undisputed evidence that she made her statements believing them to be true, and that her statements, moreover, were based on what Brad himself had told her. See, e.g., A1075.

If this were not enough, it was also undisputed that Micki was likewise aware of what Brad had told others of his - and their - old friends. The testimony of Bill Faulkner, Steve Frary and others about what Brad had told them shortly before he took his life was likewise undisputed. A1075. This included the undisputed testimony that Brad said (1) that he was suffering "stress," was "very upset" and was "despondent" about Scholz, the situation with Boston, the upcoming tour and the dropping of Fran Cosmo; (2) that he was "dreading" the upcoming tour and "didn't know how he

was going to do it"; (3) that the situation with Boston was "driving me nuts" and "driving [me] crazy"; (4) that Scholz was a "bully"; and (5) that he "was afraid Tom would make his life miserable" if he quit Boston. A1078, 1082, 1099-1101, 1103-1106, 1143-1144, 1181-1182, 1192, 1195, 1197, 1199-1201. Micki's awareness that Brad had told their old friends things that strongly reinforced what he had told her underscores her undisputed testimony that her statements were based on what Brad himself had told her, and that she made her statements with every reason to believe they were true, not with a "high degree of awareness of [their] probable falsity."

Scholz seeks to avoid the consequences of his failure to submit evidence, let alone clear and convincing evidence, that Micki entertained serious doubts as to the truth of her statements, and the undisputed evidence both that she believed them to be true and that the basis for that belief came from Brad's own statements. He does so by launching an array of arguments.

First, he argues that Micki's purported "hostility" toward him can constitute actual malice. He is simply incorrect as a matter of law. See Netherwood,

53 Mass. App. Ct. at 18; McNulty v. Kessler, 1995 WL 809931, *6-8 (Mass. Super. Ct. April 3, 1995)(McHugh, J.)(evidence that defendant had a "we-don't-like-him-and-therefore-are-going-to-get-him attitude...does not establish knowledge of a falsehood").

He next argues that there is evidence that Micki "falsely denied" using the words that the Herald reporter used in her lead paragraph and in another sentence (Statements 5 and 6) and that these "false denials" support the conclusion that she made her statements while seriously doubting their truth. Brief at pp. 36-41. But there was no evidence of a "false denial." Both Micki and the Herald are in accord that these words are not Micki's, but rather are those of the Herald. The Herald indicated this by not using quotation marks in these statements, conveying that Micki, indeed, did not use those words. And Ms. Fee's affidavit makes clear that where the Herald quoted Micki in the article, "the quote fairly reflects what Ms. Delp told me," but that in Statements 5 and 6, by contrast, "the statements fairly reflect the substance of what Ms. Delp told me" (emphasis supplied). A413-414, compare ¶¶ 4, 5 and 8 with ¶¶ 3, 6-7. There was no "dispute": both Micki and Ms. Fee were in agree-

ment that she used the words contained in the quoted portions of Statements 1-4, and did not use the words contained in Statements 5 and 6. Scholz' "false denial" theory, therefore, is simply a false theory.

The same is true of Scholz' ardent invocation of Micki's denial that she blamed Scholz for Brad's suicide as evidence of "consciousness of falsity." But Micki did not state that Scholz was the cause of Brad's death. Therefore, her testimony that she had "no idea" whether Scholz "was a major contributing factor" to Brad's death was not evidence that she made the statements that she did make believing them to be untrue. Quite simply, her statements did not even mention Scholz, let alone pin Scholz as the cause of Brad's suicide; therefore, her testimony that she was not blaming Scholz is not in any way "consciousness of falsity," except under Scholz' false and circular reasoning. In short, Scholz avidly argues that the fact that Micki denied publicly blaming Scholz for Brad's death is evidence that she was aware that her statements which do not blame Scholz for Brad's death are false. It is an argument which collapses of its own weight because her public statements did not, in fact, say that Scholz was responsible.

Scholz also argues that Brad took his life because of an upsetting incident between Brad and his fiancée's sister, Meg Sullivan, in late February 2007. He admits that "[t]he record does not specify exactly what took place," but relies on a Boston Globe article that appeared in late May, 2012, approximately 9 months after the Court's decision and over 5 years after Brad's death, and which was both hearsay and not part of the summary judgment record before Judge Cratsley. See Brief at 6-8 and n.3.

Of course, not only did Scholz provide no evidence to the Superior Court about what the incident was, but far more importantly he provided no evidence whatsoever that Micki had any knowledge of this incident when she made her statements to the Herald. Indeed, the undisputed testimony from Meg Sullivan when this incident first emerged in 2011 was that she did not share the information with Micki, and in the years since Brad's suicide only told a very few people about it. A1567-1568. Therefore, of course, even if Micki's statements could be construed as ones that Brad took his life because of Scholz, Scholz submitted no evidence that Micki was aware of the incident when she made her statements, and, indeed, it was undisput-

ed that she was not aware of it.

Finally, Scholz argues that the fact that Micki, a resident of California, could not locate the private suicide note that Brad left for her in New Hampshire when he took his life was "spoliation of evidence" that constituted clear and convincing evidence that she made her statements to the Herald with a high degree of awareness of their probable falsity. Brief at 44-45. For this proposition he cites Murphy, 449 Mass. at 61, in which, apart from other evidence of reckless disregard not present here, there was evidence that a reporter affirmatively destroyed his notes of an interview whose substance was hotly contested immediately after being informed by the plaintiff's attorney that his client had been misquoted.

First, Murphy involved the destruction of reporter's notes, not a grieving former wife's evident inability to locate a suicide note left for her back in 2007, 3,000 miles from her home. Scholz did not present evidence that Micki's inability to locate the suicide note was suspect in any way, and the undisputed evidence was to the contrary. A300-302,305-307.

Second, Scholz' spoliation theory is constructed from the following series of premises: (1) Brad did

not mention Scholz in his suicide note to Micki; (2)Micki's inability to locate that note may be inferred to be out of a desire on her part to "hide" the evidence that Scholz was not the reason for Brad's suicide; and (3) this is clear and convincing evidence that when Micki "blamed" Scholz for Brad's death, she knew that her statements were incorrect. However, Micki's statements do not blame Scholz, and therefore, that the note did not mention Scholz does nothing for Scholz' theory. Further, although Micki did not have the note, the record contains Micki's sworn recollection of what it said - and she freely acknowledges that Brad did not mention Scholz in the suicide note. A300-302. Thus, there was no "dispute" about what the note said, and thus no inference of actual malice to be drawn from Micki's inability to locate the suicide note itself for this additional reason. See Chang v. Michiana Telecasting 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 by Murphy, 449

Mass. at 61.[10]

In short, Scholz sends up one diversionary argument after another in order to distract from the points which cannot be seriously disputed: (1) he submitted no evidence that Micki made Statements 1-6 while actually entertaining serious doubts about their validity, let alone clear and convincing evidence that she actually harbored such doubts; (2)she made these statements based on what Brad had himself told her; and (3) what Brad undisputedly told her amply supported the benign, non-accusatory statements that she made. Accordingly, Judge Cratsley's conclusion that Scholz had not met his burden of showing that the statements made by Micki were made with actual malice was correct.

IV. SUMMARY JUDGMENT SHOULD BE UPHELD ON THE ADDITIONAL GROUND THAT EACH OF MICKI'S STATEMENTS CONSTITUTED NON-ACTIONABLE OPINION

Finally, summary judgment should be upheld on the

[10] Scholz notes that Murphy cited Torgerson v. Journal Sentinel, Inc., 210 Wis. 2d 524, 548 (1997), and he cites Torgerson as supportive of his spoliation theory. Brief at 45. But in Torgerson the Wisconsin Supreme Court reversed the denial of summary judgment because the reporter's destruction of her notes in the ordinary course could not meet the actual malice standard. Id. at 548-52(holding that the destruction of reporter's notes did not constitute actual malice because "Becker's deposition, however, affirms the accuracy of the article's quotation").

additional ground that each of Micki's statements were non-actionable opinions as a matter of law, rather than statements of objectively verifiable fact. Whether a communication is an opinion or a statement of fact is a question of law for the Court, not a question of fact for the jury. King v. Globe Newspaper Co., 400 Mass. 705, 708-10 (1987); Driscoll, 70 Mass. App. Ct. at 296.

Here, despite Scholz' fevered announcement at the outset of his brief that "Micki Delp told the Boston Herald that the plaintiff...had, as a matter of fact, caused her ex-husband, Brad Delp, to commit suicide," Brief at p. 1, a review of Micki's statements makes clear that she did nothing of the sort and that, in any event, each of her statements are classic opinions: inherently subjective interpretations of the state of mind of a deceased person, and what she believed he was feeling at the time of his death. Gray, 221 F. 3d at 248 (assertions that plaintiff "faked" close relationship with government official and had "failed" in business not actionable); Cole, 386 Mass. at 311-312 (Reversing trial court and entering judgment for defendants; statements were "imprecise and open for speculation" and "cannot be characterized as

assertions of fact."

Here, a plain reading of each of Micki's statements reflects that each constituted her subjective view of Brad's mental state before he died. See King, 400 Mass. at 710 (Statements about motivations ordinarily treated as opinion); Yohe v. Nugent, 321 F.3d 35, 41 (1st Cir. 2003)(Statement simply expressed an opinion about plaintiff's mental state); NAGE v. Buci Television, Inc., 118 F. Supp. 2d 126, 130-31 (D. Mass. 2000) (Dismissing libel claims based on "subjective interpretation of a public figure's motives").

That a statement must be "objectively verifiable" and "provably false" in order to be actionable under our Constitution is well-established. Milkovich, 497 U.S. at 1, 19-20; Veilleux, 206 F.3d at 108 ("only statements that are 'provable as false' are actionable"). A review of Statements 1-6 shows that none are objectively verifiable as true or false; all openly represent the personal view or surmise of Micki about the state of mind of someone who is no longer even alive to describe how he was feeling.

Nor can Scholz' creative re-characterizing of Micki's statements help him avert summary judgment. See, e.g., Friedman v. Boston Broad, Inc., 402 Mass.

376, 379-380 (1988) ("Even if the broadcast reasonably could have been understood as charging the plaintiffs with being 'insurance crooks' engaged in 'insurance fraud' and 'blatant and dramatic schemes to rip off Massachusetts policy holders,' such conclusory statements, in the context of this case, must be viewed as statements of opinion and not of fact.").

Scholz argues, however, that Micki's statements should be construed as conveying that Brad was feeling pressure from his situation with Boston or from Scholz, and that that is the reason Brad took his life. Even assuming that that is a reasonable interpretation of what Micki actually said, however, a recent decision of this Court disposes of any argument that even that statement could be actionable. In Dricoll, this Court held that statements that a student was "pressured" or "coerced" into having sex were not capable of being proved true or false, but rather were based on a "subjective judgment", and were therefore non-actionable as a matter of law. Id. at 296-98 ("[T]he statements regarding pressure or coercion cannot constitute actionable defamation."). Plainly, even had Micki asserted that Scholz had pressured Brad into committing suicide, such an assertion - - about

the decision-making process of a deceased person - - would be even less capable of being objectively verified than the statements in Driscoll, where the girl who supposedly felt "pressured" was alive and in a position to testify about how she felt.

Finally, even under Scholz' wholesale rewriting of Micki's statements - - that Scholz "had, as a matter of fact, caused her ex-husband, Brad Delp, to commit suicide" - - both the Driscoll decision and, more recently, a decision of the Eighth Circuit that is on all-fours demonstrate that, even as imagined, such a statement would be non-actionable. In Gacek v. Owens & Minor Distribution, Inc., 666 F.3d 1142 (8th Cir. 2012), the defendant actually had stated that plaintiff was the reason for another's death. It was undisputed that the defendant had claimed that plaintiff had "pushed Showers over the edge," was "the straw that broke the camel's back," and "was the reason for Bill's death." Id. at 1147. Applying Minnesota defamation law that is the same as ours, the United States District Court granted summary judgment for the defendant. The Eighth Circuit affirmed, holding that even actual assertions that a plaintiff was the cause of another's suicide were non-actionable opinions.

> 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, Micki's statements are manifestly not ones of "objectively verifiable facts." Even as re-written by Scholz and given a meaning found nowhere in her words, Micki's statements are not ones that are provably false or true. For this additional reason, though the Superior Court did not need to reach it, summary judgment should be affirmed.

CONCLUSION

For each of the foregoing reasons, summary judgment in Micki Delp's favor should be affirmed.

Respectfully submitted,

Micki Delp

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July 16, 2012

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

Pursuant to Mass. R. App. P. 16(k), I, Michael Day, counsel for Appellee Micki Delp hereby certify that Appellee's brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to M.R.A.P. 16(e), 16(f), 16(h), 18, and 20.

Michael Day

CERTIFICATE OF SERVICE

I, Michael Day, certify that, on behalf of Appellee Micki Delp, served copies of the foregoing brief via hand delivery on this 16th day of July 2012, to counsel for the Plaintiffs-appellants at:

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