COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC NO. 11621
A.C. NO. 2013-P-1884

DONALD THOMAS SCHOLZ,

Plaintiff-Appellant

v.

BOSTON HERALD, GAYLE FEE,
AND LAURA RAPOSA,

Defendants-Appellees

DIRECT APPELLANT REVIEW OF A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

BRIEF OF THE PLAINTIFF-APPELLANT DONALD THOMAS SCHOLZ

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

ISSUES PRESENTED 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 7

A. Scholz's and Brad's Work with Boston 7

B. Brad's Depression, Suicidality and "Victimization" of His Fiancée's Sister 9

C. The Herald's March 15 Article 12

D. The Herald's March 16 Article 14

E. Despite Threats of Litigation, the Herald Reporters Destroy Their Notes 17

F. The Herald's Subsequent Coverage of Brad's Suicide and Its Failure to Retract Known Errors 17

G. Prior Proceedings 19

SUMMARY OF THE ARGUMENT 21

STANDARD OF REVIEW 23

ARGUMENT 24

I. The Herald's Articles Were Factual in Nature and Not Opinion 24

A. The Ultimate Conclusion of the Herald's Articles, that Scholz Caused or Contributed to Brad's Death, Was Factual in Nature 24

B. The Herald's Alleged 'Opinions' Were Based Upon Disclosed Defamatory Facts, and Were Therefore Actionable . 30

C. The Herald's Articles, Even if Opinion, are Actionable as Implying Undisclosed Defamatory Facts 37

II. The Herald Published its Articles With Actual Malice 37

A. The Herald Fabricated Statements from 'Sources' in Its March 15 Article 37

B. The Herald Fabricated or Materially Distorted Many of the Statements Attributed to Micki Delp in the March 16 Article 41

C. Fee and Raposa's Destruction of Their Notes Is Strong Evidence of Actual Malice 44

D. The Herald's Subsequent Repetition of the False Statements in the March 15 and 16 Articles is Further Evidence of Actual Malice 45

E. Although Micki Acknowledged Saying Some of the Quotes in the March 16 Article, the Herald Nevertheless Published Them with Reckless Disregard for Their Truth or Falsity 46

III. Scholz Presented A Triable Claim for Intentional Infliction of Emotional Distress 51

IV. The Superior Court Erred in Allowing Over $130,000 in Deposition Costs 53

CONCLUSION 56

CERTIFICATE OF COMPLIANCE 56

ADDENDUM ..... following 56

TABLE OF AUTHORITIES

Cases — Page

Action Repair, Inc. v. American Broadcasting Cos., Inc., 776 F.2d 143 (7th Cir. 1985) 34

Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119 (7th Cir. 1987) 44

Cady v. Marcella, 49 Mass. App. Ct. 334 (2000) 52

Carson v. Allied News. Co., 529 F.2d 206 (7th Cir. 1976) 43

Cianci v. New Times Pub. Co., 639 F.2d 54 (2d Cir. 1980) 24, 29, 47

Clark v. County of Tulare, 755 F. Supp. 2d 1075 (E.D. Cal. 2010) 24

Cole v. Westinghouse Broad. Co., Inc., 386 Mass. 303, cert. denied, 459 U.S. 1037 (1982) ... 26

Commonwealth v. Althause, 207 Mass. 33 (1910) 28

Cooper v. Cooper, 62 Mass. App. Ct. 130 (2004) 54

Crane v. Arizona Republic, 972 F.2d 1511 (9th Cir. 1992) 48

Dilworth v. Dudley, 75 F.3d 307 (7th Cir. 1996) 25

Disend v. Meadowbrook School, 33 Mass. App. Ct. 674 (1992) 25, 26

Estate of Tobin v. SmithKline Beecham Pharmaceuticals, 2001 WL 36102161 (D. Wy. 2001) 28

Fleming v. Benzaquin, 390 Mass. 175 (1983) 25

Flowers v. Carville, 310 F.3d 1118 (9th Cir. 2002) . 37, 47

Fressell v. AT&T Technologies, Inc., 103 F.R.D. 111 (N.D. Ga. 1984) 54

Freyermuth v. Lutfy, 376 Mass. 612 (1978) 28

Gacek v. Owens & Minor Distribution., Inc.,
666 F.3d 1142 (8th Cir. 2012) 34

Gochis v. Allstate Ins. Co.,
162 F.R.D. 248 (D. Mass. 1995) 53, 54

Godbout v. Cousens, 396 Mass. 254 (1985) 37

Goldwater v. Ginsburg, 414 F.2d 324 (1969) 48

Herbert v. Lando, 441 U.S. 153 (1979) 46

Holbrook v. Casazza, 204 Conn. 336,
528 A.2d 774 (1987) 45

Hutchinson v. Proxmire, 443 U.S. 111 (1979) 37

Jones v. Taibbi, 400 Mass. 786 (1987) 47

King v. Globe Newspaper Co.,
400 Mass. 705 (1987) 30, 35, 49

Lyons v. Globe Newspaper Co., Inc.,
415 Mass. 258 (1993) 35, 36

Lyons v. New Mass Media, Inc., 390 Mass. 51 (1983) 25

Masson v. New Yorker Magazine, Inc.,
501 U.S. 496 (1991) 37, 48

McGrath v. G & P Thread Corp., 353 Mass. 60 (1967) 52

McNamee v. Jenkins, 52 Mass. App. Ct. 503 (2001) 37

McRae v. Afro-American Co., 172 F. Supp. 184
(E.D. Pa. 1959), aff'd, 274 F.2d 287
(3d Cir. 1960) 26, 29

Merrick v. Northern Natural Gas Co.,
911 F.2d 426 (10th Cir. 1990) 54

Miga v. City of Holyoke, 398 Mass. 343 (1986) 28

Milgroom v. News Group Boston, Inc.,
412 Mass. 9 (1992) 37

Milkovich v. Lorain Journal Co.,
497 U.S. 1 (1990) 24, 30

Mullins v. Pine Manor College, 389 Mass. 47 (1983) 53

Murphy v. Boston Herald, Inc.,
449 Mass. 42 (2007) ..... passim

Myers v. Boston Magazine Co., Inc.,
380 Mass. 336 (1980) 24, 27

National Ass'n of Government Emps., Inc. v. Central
Broadcasting Corp., 379 Mass. 220 (1979) 34, 35

Ng Brothers Const., Inc. v. Cranney,
436 Mass. 638 (2002) 42

N. Shore Pharmacy Servs., Inc. v. Breslin Assocs.
Consulting, LLC, 2004 WL 6001505 (D. Mass.
June 24, 2004 (magistrate) adopted
2004 WL 6001506 (D. Mass. Aug. 16, 2004),
S.C., 491 F. Supp. 2d 111 (D. Mass. 2007) 28

Nutting v. Roche Bros. Supermarkets, Inc.,
50 Mass. App. Ct. 572 (2000) 28

O'Brien v. Analog Devices, Inc.,
34 Mass. App. Ct. 905 (1993) 42

Phantom Touring, Inc. v. Affiliated Pubs.,
953 F.2d 724 (1st Cir.),
cert. denied, 504 U.S. 974 (1992) 27

Reilly v. Associated Press,
59 Mass. App. Ct. 764 (2003) 30

Roman v. Trustees of Tufts College,
461 Mass. 707 (2012) 23

Rutt v. Bethlehems' Globe Publ. Co.,
335 Pa. Super. 163, 484 A.2d 72 (1984) 25, 29

Scholz v. Delp,
83 Mass. App. Ct. 590, rev. granted,
466 Mass. 1103 (2013) 20

Shafer v. City of Boulder, 896 F. Supp. 2d 915 (D. Nev. 2012) 24

Sharon v. Time, Inc., 599 F. Supp. 538 (S.D.N.Y. 1984) 45

Smaland Beach Ass'n, Inc. v. Genova, 461 Mass. 214 (2012) 42

St. Amant v. Thompson, 390 U.S. 727 (1968) 42

Stepakoff v. Kantar, 393 Mass. 836 (1986) 28

Stern v. Cosby, 645 F. Supp. 2d 258 (S.D.N.Y. 2009) ... 50

Stone v. Essex County Newspapers, Inc., 367 Mass. 849 (1975) 50

Sullivan v. Conway, 157 F.3d 1092 (7th Cir. 1998) 25

Suzuki Motor Corp. v. Consumers Union of the U.S., Inc., 330 F.3d 1127 (9th Cir. 2002), cert. denied, 540 U.S. 983 (2003) 49

Tech Plus, Inc. v. Ansel, 59 Mass. App. Ct. 12 (2003) 27, 29, 52

Templeman v. Chris Craft Corp., 770 F.2d 245 (1st Cir), cert denied, 474 U.S. 1021 (1985) 54

Thomas v. Thomas, 1988 WL 93932 (N.D. Ill. Sept. 8, 1988) 34

Tosti v. Ayak, 394 Mass. 482 (1985) 51

Waldman v. Am. Honda Motor Co., 413 Mass. 320 (1992) 23, 53, 55

Wallace v. Ludwig, 292 Mass. 251 (1935) 52

Weaver v. Lancaster Newspapers, Inc., 592 Pa. 458, 926 A.2d 899 (2007) 46

Zerangue v. TSP Newspapers, Inc., 814 F.2d 1066 (5th Cir. 1987) 40, 41, 45

Other Authorities

Mass. R. Civ. P. 54(e) 53, 54

Issues Presented

I. Whether the Superior Court erred in holding that news stories in the Boston Herald blaming the plaintiff Donald Thomas Scholz for causing another's suicide were pure opinion and not defamatory where, among other things, (i) the accusation was provably false and (ii) the articles were widely viewed as fact and not opinion.

II. Whether the Herald published the defamatory articles with knowledge that they were false or with reckless disregard of whether they were true or false.

III. Whether the Superior Court erred in granting summary judgment for the Herald on Scholz's intentional infliction of emotional distress claim where the Herald fabricated stories blaming Scholz for his friend's suicide and where Scholz suffered documented physical and emotional harm.

IV. Whether the trial court erred in awarding the Herald over $132,000 in deposition costs where none of the depositions were necessary to the disposition of the case.

Statement of the Case

This is a defamation case. Scholz is the producer, primary songwriter, and lead musician in the rock and roll band, Boston. The band's lead singer, Brad Delp,[1] killed himself on March 9, 2007. After Brad's death, the Herald published three defamatory articles under the byline of its two longtime Inside Track columnists, Gayle Fee and Laura Raposa. All

[1] Where family members who share the same last name are involved in the case, this brief uses the person's first name for convenience. No disrespect is intended.

three falsely accused Scholz of causing Brad's suicide.

The first article appeared on March 15, 2007. It reported that Brad committed suicide by carbon monoxide asphyxiation in his Atkinson, N.H. home. It went on to say:

> Friends said it was Delp's constant need to help and please people that may have driven him to despair. He was literally the man in the middle of the bitter break-up of Boston - pulled from both sides by divided loyalties.
>
> Delp remained on good terms with both Tom Scholz, the MIT grad who founded the band, and Barry Goudreau, Fran Sheehan and Sib Hashian, former members of Boston who had a fierce falling out with Scholz in the early '80s.
>
> Delp tried to please both sides by continuing to contribute his vocals to Scholz's Boston projects while also remaining close to his former bandmates. The situation was complicated by the fact that Delp's ex-wife, Micki, is the sister of Groudreau's wife, Connie.
>
> "Tom made him do the Boston stuff and the other guys were mad that they weren't a part of it," said another insider. "He was always under a lot of pressure."
>
> As you may know, in 1976 the band's first album, featuring Scholz, Delp, Goudreau, Hashian and Sheehan, was the best-selling debut album in history, spawning rock staples "More Than a Feeling," "Peace of Mind," "Foreplay Long Time" and "Rock and Roll Band." But shortly thereafter things deteriorated.
>
> Scholz's penchant for perfection and his well-chronicled control issues led to long delays between albums. As a result, Goudreau, Delp and

Hashian released an album without him, which led to an irretrievable breakdown.

Scholz claimed that the other band members - with the exception of Delp - attempted to steal the name Boston. While the bitter battle raged, Delp tried to keep peace with both sides. He continued to perform with Scholz and the reconstituted Boston but also did projects with Goudreau and remained friends with the other original members.

But the never-ending bitterness may have been too much for the sensitive singer to endure. Just last fall the ugliness flared again when Scholz heard some of his ex-bandmates were planning to perform at a tribute concert at Symphony Hall for football legend Doug Flutie - and then had his people call and substitute himself and Delp for the gig, sources say.

In fact, the wounds remained so raw that Scholz wasn't invited to the private funeral service for Delp that the family held earlier this week.

"What does that tell you?" asked another insider, "Brad and Tom were the best of friends and he's been told nothing about anything."

See Joint Record Appendix ("A") at 486-87.[2]

The next day, the Herald ran a second article about the role of the "never ending bitterness" in Brad's death under the page 1 headline "PAL'S SNUB MADE DELP DO IT" and in smaller type below: "Boston rocker's ex-wife speaks." A490. In the Inside Track section, the article (under the by-line of Fee and Raposa) read, in pertinent part:

[2] The articles at issue also appear in their entirety as an addendum to this brief.

Boston lead singer Brad Delp was driven to despair after his longtime 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.

"No one can possibly understand the pressures he was under," said Micki Delp, the mother of Delp's two kids, in an exclusive interview with the Track.

"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."

Cosmo, who had been with Boston since the early '90s, had been "disinvited" from the planned summer tour, Micki Delp said, "which upset Brad."

But according to Tom Scholz, the MIT-educated engineer who founded the band back in 1976, the decision to drop Cosmo was not final and Delp was not upset about the matter. (Cosmo's son Anthony, however, was scratched from the tour.)

"The decision to rehearse without the Cosmos was a group decision," Scholz said in a statement through his publicist. "Brad never expressed unhappiness with that decision . . . and took an active part in arranging the vocals for five people, not seven."

Nonetheless, according to the singer's suicide notes released yesterday, Delp said he had 'lost my desire to live.'

Police say Delp sealed himself inside his bathroom last Friday, lit two charcoal grills and committed suicide via carbon monoxide poisoning.

"Mr. Brad Delp, J'ai une ame solitaire. I am a lonely soul," said one of the notes. "I take

> complete and sole responsibility for my present situation." The note also included instructions on how to contact his fiancée, Pamela Sullivan, who found Delp's body.
>
> . . .
>
> According to Micki Delp, Brad was upset over the lingering bad feelings from the ugly breakup of the band Boston over 20 years ago. Delp continued to work with Scholz and Boston but also gigged with Barry Goudreau, Fran Sheehan and Sib Hashian, former members of the band who had a fierce falling out with Scholz in the early '80s.
>
> As a result, he was constantly caught in the middle of the warring factions. The situation was complicated by the fact that Delp's ex-wife, Micki, is the sister of Goudreau's wife, Connie.
>
> "Barry and Sib are family and the things that were said against them hurt," Micki said. "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."

A490-91. Those who read the stories understood that they identified Scholz as the culprit in Brad's decision to end his life based on supposed "inside information" from Brad's ex-wife, Micki Delp, and various alleged unnamed "insiders" and "friends."

The third article appeared on July 2, 2007. There, Fee and Raposa reported that Boston's "warring factions" would reunite for a tribute concert to Brad. They added that Scholz and his former sidemen had "been at odds for decades and the lingering bad feelings from the breakup of the original band more than 20 years ago reportedly drove singer Delp to take his own life in March." A494.

In March 2013, the Superior Court (McIntyre, J.) held that '[d]espite the amassing of powerful evidence of [Brad's] mental state," it was "impossible" for Scholz to "disprove the proposition" that Scholz was "the actual cause of [Brad's] suicide." A1757. The court therefore held that the articles were not actionable because "[n]o one ever knows what actually motivated the person -- in that last tortured moment -- to end his life." A1775. Thus, while the court did not doubt that the Herald's articles blamed Scholz for Brad's death, it believed that those statements could only be deemed opinion and, as such, non-defamatory.

The Superior Court erred. Scholz's burden at trial will be to show that the articles were substantially false by a preponderance of the evidence, not to prove beyond the slightest possible philosophical doubt why Brad killed himself. Testimony from Brad's closest friends, emails from his final days and his suicide notes, leave no reasonable doubt about why he killed himself, and it had nothing to do with Scholz. Virtually every supporting 'fact' that the Herald cited in its articles - from the 20 year old 'tensions' which no longer existed to 'bitterness' that was long gone to the attribution of Cosmo's firing as the immediate cause of death - was provably false. Thus, for those reasons and for the

other reasons discussed below, the Superior Court erred and its decision must be reversed.

Statement of the Facts

A. Scholz's and Brad's Work with Boston.

Scholz is an M.I.T. graduate who founded the rock music group Boston in 1975. A5647. He has been the leader of Boston ever since, and is well known as such. A1139 at ¶ 548.

Scholz's relationship with Brad was consistently good. A1413 at ¶ 1193. Brad was part of Boston from the beginning and for the most part they worked together harmoniously. Id. Brad and Scholz were both vegetarians who were deeply supportive of anti-violence and anti-cruelty organizations. Id. Brad stated his respect for Scholz on many occasions, both publicly and privately. A1415 at 1997; A1424 at ¶¶ 1198-1205; A1278-81 at ¶¶ 891-900.

In the 1980s, Barry Goudreau, Sib Hashian and Fran Sheehan - the three other members of Boston at the time - left the band. A1135 at ¶ 544. Goudreau and Hashian initiated lawsuits against Scholz, and Scholz later sued Sheehan. Id. Although Micki is Goudreau's sister-in-law (that is, Micki's sister Connie is married to Goudreau), Brad remained neutral and continued to work with Scholz. A1405 at ¶¶ 1174-75; A1174-75; A1407 at ¶ 1178; A6074.

During this time, Scholz and Brad had an

understanding that Brad was a "free agent" and was always welcome, but not required, to work with Scholz. A1386-88 at ¶¶ 1132-37; A6072-73. In fact, Brad temporarily left Boston for a time in the early 1990's to work with RTZ, a band he founded with Goudreau, Hashian, and others. A1386-87. Brad consistently expressed to friends his independence from both Scholz and Boston on the one hand and Goudreau, Hashian, and RTZ on the other. See A1395-1405 at ¶¶ 1150-75. As a column that Fee and Raposa wrote for the Herald in 2002 reported, Brad had "remained neutral" and was "proud of the fact that he's managed to stay friends with all of his bandmates over the years." A6074.

In November 2006, Boston performed a show without Cosmo, with whom Brad had shared lead vocal duties since 1995. A1436 at ¶ 1220. Brad was not upset that Cosmo was not part of the show and unlikely to be in the band in 2007, and was enthusiastic about the prospect of an upcoming tour. A1437-41 at ¶¶ 1224-32. In fact, at the time of his death in March 2007, Brad had not seen or spoken to Cosmo since October 2004. A1437 at 1223.

In early January 2007, Scholz reached out to Brad to confirm that he wanted to tour with Boston that summer. A5866. Scholz told Brad that if he did not, the tour would not go forward. Id. Two weeks before his death, Brad gave an interview to Limelight

magazine, A124-31, in which he talked about his work with Boston and expressed enthusiasm and optimism over that summer's possible tour. A1280 at ¶ 900.

Only one week before Brad's death he learned that the tour might not go forward. A5876. On March 1, 2007, Scholz emailed Brad and the rest of the band to tell them that only three tour dates had been confirmed and he was "holding off on spending money for the live production set work . . . until this tour is definite." Id.

B. Brad's Depression, Suicidality and "Victimization" of His Fiancée's Sister.

Brad had a long history of anxiety and depression. Starting in 1991, he took Xanax, which largely seemed to resolve his stage fright. A1442-43 at ¶ 1235-40. The depression and suicidality continued, however, and were observed by his family and friends. A1307-13 at ¶¶ 944-63. His former fiancée, Pat Komor, observed that the anxiety and depression usually coincided with upsetting events in his personal life. A5827 at ¶ 14.

Brad's personal life had more than its share of upsetting events. Micki, his second wife, separated from him in 1991 and divorced him in 1996 because of his mental health issues. A1308 at ¶ 947. In 1996, she moved their two children, then approximately 11

and 15 years old, permanently to the West Coast, which greatly upset Brad. A1308 at ¶¶ 948-49.

Brad became romantically involved with Pam Sullivan in approximately 2000. A1254 at ¶ 841. In the summer of 2006, however, Pam had a relationship with another man. A1255-58 at ¶¶ 842-46. Brad was "despondent" and told a confidant that he "didn't think he'd be able to recover from it." A1259 at ¶ 847. Pam moved out of Brad's home in September, 2006. A1261 at ¶ 851. Nevertheless, they reconciled, and were due to be married in August of 2007. A1113 at ¶ 512.

Nine days before Brad's suicide, a serious incident occurred between Brad and Meg Sullivan, Pam's younger sister. A1282-83 at ¶¶ 901-07. Meg, who lived in a spare bedroom in Brad's Atkinson, N.H. home, discovered that Brad had taped a small camera to the ceiling of her bedroom. A1283 at ¶ 907. The camera was rigged to transmit audio and video to a receiver in another part of the house. A1283 at ¶ 907. When Meg and her boyfriend, Todd Winmill, confronted Brad about her discovery, Brad was devastated. A lengthy email to Meg expressed his sorrow at having "victimized" her. A1292 at ¶ 917; A5890. In another email, Brad acknowledged that he had "committed that most egregious sin against" her. A5878. Meg wrote to him just days before he took his

life, "I am very concerned for you [Brad]," and asked for assurance that "you aren't planning anything harmful to yourself." A5888. At the same time, Meg told Brad that he "hurt [me] to the core." Id. As Meg would later testify at deposition, she was concerned about Brad hurting himself because "he was depressed. I knew he had thought about suicide." A5030 at 96. Brad also had communicated his profound distress. He wrote: "I have made a mess of the lives of my three closest friends. I don't know if I will ever forgive myself for that." A5891. He also wrote: "I don't think anyone could think less of me as a person as I am feeling about myself at this moment." A5878. Upon reading Brad's emails and suicide note to Meg and Winmill, Brad's friends, including Meg, conceded that the anguish expressed by Brad there was like nothing they had ever before heard from him. A1338 at ¶ ¶ 1021-1029.

On the morning of March 8, 2007, Meg and Winmill went back to Brad's house to remove the last of Meg's belongings. A1301 at ¶ 932. Meg heard Winmill yelling at Brad, telling him that he had done a "terrible thing" that caused "some serious damage" to Meg. A5018 at 45. Winmill swore at Brad. Id. Brad was crying and very quiet. Id. "The only things I really heard him [Brad] say," Meg testified "was repeated 'I'm sorries.'" Id. That same afternoon,

Brad purchased the charcoal grills he used that night to suffocate himself in his bathroom. A1302 at ¶ 933. Pam discovered the body the next day; she left work when she did not hear from him and had "a bad feeling" that he might try to kill himself. A1326 at ¶ 986.

Brad left behind multiple suicide notes: one to Pam, one to Meg and Winmill, one to his two adult children, and one to Micki, as well as two public notes. A1315 at ¶ 967. One of the public notes, clipped to the neck of his shirt, read: "Brad Delp. J'ai une áme solitaire. I am a lonely soul." A1320 at ¶ 976. Another public note, intended for whoever found him, read in part: "I take complete and sole responsibility for my present situation." A3130-31. In his suicide note to Meg and Winmill, Brad apologized "for the heartache I have caused you." A5943. In the note to his children, he revealed "emotional issues" dating back to when he was a child that prevented him from being able to share his deepest emotions with other people. A5308. Not one of the notes mentions Scholz, Boston, Fran Cosmo or anything having to do with Brad's professional life. A1306 at ¶ 943; A1315 at ¶ 968; A1316 at ¶ 970; A1318 at ¶ 972; A1319-20 at ¶¶ 974-77.

C. The Herald's March 15 Article.

The Herald's "Inside Track" is a column written by Gayle Fee and Laura Raposa that covers

entertainment news. A1175-76. When the Atkinson police confirmed Brad's suicide on March 14, Fee allegedly began to call "sources" for the article. A1221 at ¶ 736.

The March 15 article, quoted at 2-3 above, attributed the information in it to unnamed "insiders" and "friends." As discussed below in part II of the argument section, virtually all of Fee's claimed "sources" denied speaking with the Herald or providing it with the key information in the article.[3] See generally A1186-1202.

On the morning that the March 15 article appeared, Fee appeared on WAAF radio. A1224 at ¶ 743; A6221. She admitted that she herself found her own story hard to believe, and initially doubted the likelihood that someone would kill himself because of job difficulties ("this couldn't possibly be the reason"), but added: "Once you start looking at how bitter and ugly and bad the feelings still are twenty years later and think about putting up with that maybe every day of your life for twenty years . . . maybe

[3] To take only one example, the Herald supposedly relied on Ernie Boch, Jr. for the information that Goudreau and Hashian were "mad" that they weren't part of Boston, creating the "never-ending bitterness" that allegedly became "too much for the sensitive singer to endure." See 485 (article); A6409 (Fee interrogatory responses). Boch *denied* talking to the Inside Track about that. A3435 at 164, A3437 at 208; infra, Argument at part I(B).

it could push somebody who is kind of sensitive over the edge." A6227. She reached that conclusion on her own; no source had told her that Brad was suffering at all, much less "every day," as a result of past band-related conflicts. A1224 at ¶¶ 744-45; A1225 at ¶ 746; A3897 at 283-85. She also stated that Scholz apparently "gave Brad nothing but grief his entire life," which, again, no source had told her. A6227; A1225 at ¶ 747.

D. The Herald's March 16 Article.

On March 15, Fee called Micki because she wanted to speak to her for a follow-up article. A1203 at ¶ 688. A3709 at 576. At the time Fee and Micki spoke, Gail Parenteau, Scholz's publicist, had already warned Fee that Micki had previously called Parenteau saying "vile things about Tom," and saying, "I'll make sure that Brad's suicide is pinned on Tom," and "I am f***ing sick of Tom." A4490 at 531.

Micki and Fee spoke for a "minute or so". According to Micki, Fee "tried to get me to say that it was about the band," including asking Micki about whether Brad's suicide had "anything to do with the bad relationships in the band or . . . the political problems" in it. A1205 at ¶ 694; A3711 at 585. Micki told Fee that it did not. A3714 at 598. When Fee asked if Micki knew whether there was anything that Brad was "upset by," Micki replied that he was upset

that Cosmo "had been uninvited on the tour." A1204 at ¶ 691; A3713 at 595. "Upset", however, was as far as it went. A3711 at 585 ("That was it"); A3713 at 595 ("I believe I did say disinvited . . . [a]nd that's all I said.").

Fee's article was the lead story in the March 16 Herald. A489. The page one headline read, "PAL'S SNUB MADE DELP DO IT." See A1205 at ¶ 692. The article, quoted at 3-5 above, conveyed that Brad was driven to suicide by Cosmo's firing (the "snub" that "made him do it"). It also claimed that Brad at his death was still "upset over the lingering bad feelings from the ugly breakup of the band Boston over twenty years ago." A489.

When she saw the paper on March 16, Micki was "furious" and immediately called Fee to complain about being misquoted. A3715 at 603. She told Fee, "Contact your legal counsel and straighten that out because that's not what I said." Id. Micki also complained vehemently to friends and relatives that she was misquoted.[4] A1208 at ¶ 700; 1209-10 at ¶¶ 704-05. At Micki's request, Pam Sullivan called Scholz and told him the article was "a pack of lies." A1209

[4] For example, Micki testified at her 2008 deposition that she "categorically" denied telling Fee that Brad was "upset over the lingering bad feelings from the ugly breakup of the band Boston over twenty years ago" or anything close to it, and said that she does not even believe it to be true. See A1206 at ¶ 696.

at ¶ 703; A5169 at 230. See generally A1207-08 at ¶¶ 695-700.

The Herald's articles had an immediate and profound effect. When Scholz went out in public, he noticed a distinct change in the way that people dealt with him. See A1548 at ¶ 124; A1540 at ¶ 110. He felt like a "disgrace and a hoax" because the articles had "destroyed' the humanitarian reputation he had worked his entire life to develop and he did not want to go out in public because he would be recognized as the person "accused of killing Brad Delp." A1540 at ¶ 110. See A1548 at ¶ 124; A5636-38. The repetition of the Herald's articles on the internet and other media compounded Scholz's feelings. See, e.g., A1544 at ¶ 116. Scholz's emotional distress has manifested itself in many ways, including fatigue and lack of motivation, significant and persistent insomnia, lack of appetite and nutrition, and difficulty focusing and concentrating. A1545 at ¶ 117. Physical symptoms included gastrointestinal difficulties, increased blood pressure, and worsened back pain from a pre-existing condition which had previously been well controlled by medication. See A1545 at ¶¶ 117-118. Throughout this time, Scholz saw doctors on a regular basis, and his medical records document the physical and emotional difficulties the Herald articles caused. See A1576-96.

E. Despite Threats of Litigation, the Herald Reporters Destroy Their Notes.

On March 24, Fee's column reported that Scholz's attorney had threatened Micki with a defamation suit. A6613. The article also stated that Micki "never blamed Scholz for [Brad's] death." Id. At that point, the Herald knew what Scholz did not yet know, and would not learn until after Micki's deposition more than a year later: that Micki vehemently denied saying what the Herald had published and had threatened litigation of her own. See A3715 at 603.

Despite the immediate controversy that erupted over the articles, however, Fee and Raposa destroyed their notes, which they stored on the Herald's computer system. See A1242 at ¶¶ 802-806. Each reporter took the affirmative step of sending her notes to the electronic "spike queue" before they were overwritten. A1243 at ¶ 807. Fee and Raposa also had the option of printing their notes out and saving the hard copy, but they did not. A1243 at ¶ 806.

F. The Herald's Subsequent Coverage of Brad's Suicide and Its Failure to Retract Known Errors.

In the months that followed, the Herald wrote several more articles about Brad's suicide. On July 2, 2007, the paper reported that Scholz and former band members "Barry Goudreau, Sib Hashian, and Fran Sheehan . . . have been at odds for decades and the

lingering bad feelings from the breakup of the original band more than twenty years ago reportedly drove singer Delp to take his own life in March." A3085. The article, written by Raposa, was purportedly based on the Herald's March 15 and 16 reporting, but actually misrepresented the contents of those articles insofar as Scholz's firing of Cosmo was what had allegedly "made Delp do it." A1215 at ¶¶ 719-20. No source had told the Herald that "lingering bad feelings" between Scholz and the former members caused Brad to kill himself. A4512 at 146-47.[5]

In 2011, discovery in this litigation uncovered Brad's emails with Meg and Winmill and Brad's previously undisclosed private suicide notes. A1249-50 at ¶¶ 824-29. In May 2012, the Herald ran two more articles about Brad's suicide. A6706; A6708. Neither article said anything about the suicide notes or Meg's deposition testimony or Brad's final emails. Ibid. Instead, the Herald once again conveyed that Scholz's mistreatment of Brad had caused him to commit suicide.

[5] The Herald has a proclivity for misquoting even itself. On January 18, 2008, the Herald returned to the subject of Brad's suicide and wrote: "Following his death, Micki Delp - the mother of his two children - told the Herald that Delp was driven to despair by the ongoing battles stemming from the breakup of the band in the early 80s." A6593. This statement again differed from the Herald's prior reporting in that it attributed Brad's death directly to band tensions rather than to Cosmo's firing.

Ibid. When the Boston Globe published an article focusing on the Herald's failure to tell its readers the truth about Brad's last days, the Herald responded with an article accusing the Globe reporter of bias. See A6274 (Globe article); A6711 (Herald article). The Herald also refused to retract its prior articles despite a personal plea from Scholz. A6704.

G. Prior Proceedings.

Scholz initially sued Micki Delp in the Middlesex Superior Court for defamation. After Micki testified at deposition that she never made many of the statements the Herald attributed to her, Scholz sued the Herald. See A40 (Complaint). Initially, the Herald moved to dismiss on numerous grounds, including that the articles were opinion. See A154-56. The Superior Court (Cratsley, J.) denied that motion. A143.

After extensive discovery, the Herald filed a motion for summary judgment supported by two fact statements which collectively totaled approximately 165 pages. See A173. Scholz responded with a motion for protective order seeking to limit the length of the fact statements, which the Superior Court denied. A34 at entry of 6/11.

The Superior Court (McIntyre, J.) entered summary judgment in the Herald's favor in March 2013. See

A1756.[6] The court held that each of the Herald articles had a defamatory connotation because each conveyed that Scholz caused Brad's suicide. A1767-70. However, the court dismissed Scholz's defamation claim on the grounds that the articles blaming Scholz constituted non-actionable opinion. As the court put it:

> No one ever knows what actually motivated the person to end his life. Considering the context of the article, presented as insider information ('gossip' if you will) about entertainment celebrities, it would only be reasonably perceived as an opinion held by a person or persons with some familiarity with the situation. No other interpretation is reasonable.

A1773. The court further held that the Herald's articles provided the factual grounds for the 'opinions', which "gave the reader the opportunity to make up his own mind in assessing whether the defendants' published statement offered a valid opinion as to the cause of Delp's suicide." A1776.

Following the court's summary judgment decision, the Herald moved for $132,163.89 in costs, primarily

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[6] At that time, the Superior Court's summary judgment in Micki's favor had not yet been reversed. See Scholz v. Delp, 83 Mass. App. Ct. 590, rev. granted, 466 Mass. 1103 (2013). At summary judgment, the Herald argued vehemently that the Superior Court's summary judgment in the Delp case collaterally estopped Scholz. See, e.g., A322, A335. Now that the Delp summary judgment has been vacated, the Herald is running from that argument as fast as it can. See "Appellee's Response to Appellant Scholz's Request for Direct Appellate Review," DAR No. 22142, January 6, 2014, at 2-5.

deposition costs. A1783. Scholz objected that few if any of the depositions in the case were "reasonably necessary" to the Court's disposition of the motion. A1963. The court awarded the Herald the entire amount requested. See A1996-2001. The court stated as a policy matter that it "favor[ed] allowing costs" to vindicate the Herald's First Amendment rights so that "the costs associated with extended defamation litigation" not induce "self-censorship." A2001. This appeal followed.

Summary of the Argument

The Superior Court erred in holding that the Herald's articles were non-actionable opinion. The articles conveyed that Scholz caused Brad to kill himself. That is a provably false statement. Notwithstanding the Superior Court's analysis, the issue of why someone committed suicide is regularly litigated. Scholz's burden was to demonstrate sufficient facts to show a triable issue on whether statements were materially false, not to rule out any and all possible causes. Scholz's evidence more than met this undemanding standard. [Infra, 24-30] Even if the Superior Court had been correct that the cause of suicide can never be known with certainty, the Herald's articles were replete with disclosed false facts. There was (for example) no 'pressure' from Scholz to perform with Boston, there were no 'warring

factions, and Brad was not 'driven to despair' by Cosmo's firing. Attributing such misinformation to 'friends' and 'insiders' further made it appear as though the articles were based on additional undisclosed defamatory facts. Accordingly, the Herald's articles were not protected opinion. [30-36]

Scholz also adduced more than sufficient evidence to raise a triable question about whether the Herald published its articles with actual malice, i.e., with knowledge that they were false or with reckless disregard for whether they were true or false. Virtually every source for the March 15 and March 16 articles denied providing the Herald with the information that the Herald claims they provided. [37-44] Other indicia of actual malice include (i) Fee and Raposa destroying their notes, (ii) the Herald's failure to report the post-publication discovery of information showing the falsity of its earlier reports, and (iii) persuasive evidence that the Herald reporters set out with a preconceived plan and shaped the facts to fit the story. [44-51] Thus, there was more than sufficient evidence of actual malice to reach a jury.

The Superior Court also erred in dismissing Scholz's IIED claim. Fabricating a false story that someone caused a close friend to kill himself is more than sufficient for outrageous conduct, and Scholz's

medical records and testimony documented a causal link between the Herald's articles and accepted symptoms of stress such as insomnia and high blood pressure. Thus, that claim must go to the jury as well. [51-53]

Finally, even if the Court affirms the judgment below, the Superior Court erred in awarding the Herald all of its deposition related expenses as costs. Under the standard of reasonable necessity, the question is whether the costs were necessary to the resolution of the case. Because the Superior Court's decision rested solely on a reading of the articles and none of the Herald's depositions (the vast majority of which were irrelevant to the issues before the court in any event), the court's award of all of the Herald's costs must be reversed. [53-55]

Standard of Review

This Court reviews the Superior Court's summary judgment de novo to determine "whether, viewing the evidence in the light most favorable to the non-moving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." Roman v. Trustees of Tufts College, 461 Mass. 707, 710-11 (2012). The Superior Court's award of costs is reviewed for abuse of discretion, including errors of law. Waldman v. Am. Honda Motor Co., 413 Mass. 320, 328 (1992).

Argument

I. The Herald's Articles Were Factual in Nature and Not Opinion.

At summary judgment, the Herald's burden was to establish, by undisputed facts, that no reasonable person could understand the challenged statements as factual rather than opinion. Where "the allegedly libelous remark could have been understood by the average reader in either sense, the issue must be left to the jury's determination." Myers v. Boston Magazine Co., Inc., 380 Mass. 336, 340 (1980). The articles could be interpreted (and many readers did interpret them) as stating facts or, at a minimum, as based on disclosed false facts and implied defamatory facts.

A. The Ultimate Conclusion of the Herald's Articles, that Scholz Caused or Contributed to Brad's Death, Was Factual in Nature.

The primary test for whether a statement is fact or opinion is whether the statement is provably false.[7]

[7] The form of the expression is not dispositive, as there is no "wholesale defamation exemption for anything that might be labeled 'opinion'". Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990), citing Cianci v. New Times Pub. Co., 639 F.2d 54, 62 (2d Cir. 1980). For useful examples of the principle, see Clark v. County of Tulare, 755 F. Supp. 2d 1075, 1093 (E.D. Cal. 2010) (although "unsafe" may in the abstract have "contours of opinion," it may be factual when viewed in the context of an official investigative report where an individual was shot due to the alleged lack of safety); Shafer v. City of Boulder, 896 F. Supp. 2d 915, 941 (D. Nev. 2012)

See Lyons v. New Mass Media, Inc., 390 Mass. 51, 60-61 (1983). The opinion rule has both a philosophical and a pragmatic justification. Words which do not convey false information but are only ill-mannered or blatantly opinionated do not actually harm someone's reputation. See Fleming v. Benzaquin, 390 Mass. 175 (1983). Pragmatically, the opinion rule insures that courts need not attempt to do that which they are not capable of doing. See Lyons at 60; Dilworth v. Dudley, 75 F.3d 307, 309-10 (7th Cir. 1996). "The test is whether a reasonable listener would take [the speaker] to be basing his 'opinion' on knowledge of facts of the sort that can be evaluated in a defamation suit." Sullivan v. Conway, 157 F.3d 1092, 1097 (7th Cir. 1998).

A false statement blaming a person for another's suicide and uttered in a context where the statement could be read as factual is defamatory. Rutt v. Bethlehems' Globe Publ. Co., 335 Pa. Super. 163, 174, 484 A.2d 72 (1984) (holding that a newspaper article which could "be construed to imply that appellant had in some way caused or contributed to the apparent

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(statement that "I wouldn't want to live next to that either" was actionable if the jury determined it implied that plaintiff was a dealer in narcotics). See generally Disend v. Meadowbrook School, 33 Mass. App. Ct. 674, 675 (1992) ("words not inherently disparaging may, however, have that effect if viewed contextually").

suicide of his son" posed a jury issue as to defamation); McRae v. Afro-American Co., 172 F. Supp. 184, 186 (E.D. Pa. 1959), aff'd, 274 F.2d 287 (3d Cir. 1960) (insinuation that a mother caused her daughter to commit suicide because her mother was "extremely displeased over her . . . class standing" was defamatory). The March 15 article was teased on page one, and the March 16 article was the subject of a page one banner headline. A485, 489. That is not where opinion is found. Determining whether a statement is factual requires the court to "examine the statement in its totality in the context in which it was uttered or published . . . including the medium by which the statement is disseminated and the audience to which it is published." Cole v. Westinghouse Broad. Co., Inc., 386 Mass. 303, 309, cert. denied, 459 U.S. 1037 (1982) (internal quotation and citation omitted). The Inside Track purports to convey inside information. See Disend at 677 (context indicated that letter "was not an exercise in commentary but a communication in the nature of a report of fact"). Other media outlets picked up the story, a sure sign that they too regarded it as factual. A1153-56. If the cause of a man's suicide is inherently unknowable, as the Herald now appears to claim, it had no business presenting it to the public as page one news.

There is no doubt that the average reader could have (and did) read the articles as factual. See Myers at 340. Witness after witness agreed that the articles (in Micki's words) gave "the impression that Brad took his life because of something Tom Scholz did." A1162 at ¶ 584, A7094-95.[8] "[T]he relevant question is not whether the challenged language may be described as an opinion, but whether it reasonably would be understood to declare or imply provable assertions of fact." Phantom Touring, Inc. v. Affiliated Pubs., 953 F.2d 724, 727 (1st Cir.), cert. denied, 504 U.S. 974 (1992). If so many *did* read the articles as factual in nature, the Superior Court erred as a matter of law in determining that the average reader *could not* so regard them.

The Superior Court also erred in holding that no court could say with certainty why Brad killed himself. "A given state of mind is a fact that can be proved like any other, and indeed, is proved in every criminal prosecution." Tech Plus, Inc. v. Ansel, 59

[8] For other witnesses who testified to essentially the same effect, see A5087 (Pam) (Herald's articles were "a pack of lies"); A4040 (Micki's sister, Connie Goudreau) (agreeing that March 16 article conveyed that Scholz's dropping Cosmo from the tour "made Brad kill himself"); A4087 at 189 (Barry Goudreau)(March 15 article made "it appear as though Tom contributed to Brad's suicide"); A3990 at 109 (Geary) (agreeing that the March 16 article "insinuated that . . . Scholz, as the leader of BOSTON, was responsible for Brad's suicide").

Mass. App. Ct. 12, 22 (2003). "The state of a man's mind is as much a fact as the state of his digestion." Commonwealth v. Althause, 207 Mass. 33, 48 (1910) (internal quotation and citation omitted). Far from considering the cause of a person's suicide to be 'inherently unknowable,' Massachusetts law does not even regard the issue to be especially problematic. See, e.g., N. Shore Pharmacy Servs., Inc. v. Breslin Assocs. Consulting, LLC, 2004 WL 6001505 (D. Mass. June 24, 2004 (magistrate) at *4-6, adopted 2004 WL 6001506 (D. Mass. Aug. 16, 2004), S.C., 491 F. Supp. 2d 111, 133-34 (D. Mass. 2007) (estate of person defamed may bring libel action for damages where defamatory statements allegedly caused person defamed to commit suicide). See also Stepakoff v. Kantar, 393 Mass. 836 (1986) (suit for damages for suicide while in protective custody); Miga v. City of Holyoke, 398 Mass. 343, 344 (1986) (same); Freyermuth v. Lutfy, 376 Mass. 612, 618-620 (1978) (wrongful death claim following suicide); Nutting v. Roche Bros. Supermarkets, Inc., 50 Mass. App. Ct. 572, 573-74 (2000) (claim for negligent infliction of emotional distress following suicide after termination of employment). In the products liability context, see, e.g., Estate of Tobin v. SmithKline Beecham Pharmaceuticals, 2001 WL 36102161 (D. Wy. 2001) (manufacturer of pharmaceutical liable for

suicide). The plaintiffs in all such cases face a variety of hurdles in terms of the proof they must offer, but it is not beyond ascertainment why the individual did in fact kill himself.

The court below apparently believed that Rutt, McRae, and Tech Plus were inapplicable because Scholz was "obligated to factually disprove a mental state, not satisfy a jury that a mental state existed." A1775.[9] But Scholz is *not* "obligated to factually prove that [he] was not in Delp's mind *at all* at the fatal moment." Id. (emphasis supplied). Like every other limited purpose public figure in a libel case, Scholz's burden is to show by a preponderance of the evidence that the challenged statements were not "substantially true." Murphy v. Boston Herald, Inc., 449 Mass. 42, 51, n. 10 (2007). The articles accused Scholz, in essence, of pushing Brad to the edge of the precipice with years of misery, then kicking him over the edge. Proving the falsity of those propositions will not differ substantially from what other tort plaintiffs must show in other contexts. Hence, the

[9] It appears the fundamental misunderstanding of the lower court lay in taking the term 'opinion' to denote any proposition which cannot be established with apodictic certainty. But very little can be established with that level of certainty, and no litigant in any context bears that burden. See Cianci, 639 F.2d at 64.

Superior Court erred in holding that the articles were opinion and not provably false and defamatory fact.

B. The Herald's Alleged 'Opinions' Were Based Upon Disclosed Defamatory Facts, and Were Therefore Actionable.

Even if the core libels in the articles could somehow be considered opinion, they were based upon disclosed false facts. Where the facts stated as the basis of the 'opinion' are false and disparaging, "if those facts are either incorrect or incomplete, or if [the speaker's] assessment is erroneous, the statement may still imply a false assertion of fact." Milkovich 497 U.S. at 18-19. See also Reilly v. Associated Press, 59 Mass. App. Ct. 764, 773 (2003) (Boston Herald's opinionated statements about quality of veterinarian care were libelous when based upon false statements of fact); King v. Globe Newspaper Co., 400 Mass. 705, 717 (1987) (allegations of misuse of public office actionable where based upon specific events which did not occur). Here, the subsidiary 'facts' which the Herald marshaled to justify its conclusion were provably false.

The statement that Brad was "the man in the middle of the bitter breakup" of Boston, who was "pulled from both sides by divided loyalties", and who tried to please both sides, was at best ancient history. A4409 at 483 (Brad's friend John Muzzy);

A6814 at 273 (Kilbashian) (Brad was not under pressure); A4207 at 179 (Hashian) ("Absofuckingloutely not."). The express and implied suggestion that this caused Brad's suicide and that Scholz was responsible was false. A5133 at 79, A5136 at 92 (Pam); A7148 at 103 (Connie). There were no "warring factions," as the Herald claimed. See A4199 at 167 (Hashian); A7150 at 117 (Connie); A5165 at 214 (Pam). The statement that the "never-ending bitterness" was "too much for the sensitive singer to endure" was simply false. See A3720 at 620; A4173 at 10 (Hashian); A7150 at 117 (Connie). Brad was not "upset over lingering bad feelings" from the "breakup of the band 20 years ago." See A6812 at 268 (Kilbashian); A7091 at 333 (Micki); A1366 at ¶ 1088 (Meg); A4405 at 462 (Muzzy); A4205 at 194 (Hashian); A1376 at ¶ 1112 (Komor). He didn't try to "please both sides." See A4199 at 168 (Hashian).

A controlling assumption of the Herald's March 15 article - that "family ties" "complicated" the "situation" - was also simply erroneous. See A1349 at 1051 (Micki); A1363 at 1078 (Connie). In fact, the family never talked about business. A3712 at 588. Goudreau and Hashian (one side of the 'warring faction' that Scholz had allegedly banished from Boston) were not upset that they "weren't part of" Boston, as the Herald falsely claimed. See A3712 at

591 (Micki) ("They were very pleased that they weren't a part of it."); A7150 at 116-17 (Connie); A7147 at 101; A4202 at 179 (Hashian)("Q. Why are you laughing? A. It's bullshit."). There were no "ongoing battles." A4206 at 197 (Hashian).

A critical falsification in the March 15 article (continued forward in the theme of the March 16 article) was that "Tom made [Brad] do the BOSTON stuff." That statement was plainly factual and, as numerous witnesses testified, false. See A6812 at 268 (Kilbashian); A5042 at 204-05 (Meg); A1368 at ¶ 1092 (Muzzy); A1370 at ¶ 1098 (Hashian); A1375 at ¶ 1109 (Komor). At all times, it was Brad's choice whether to play in the band, and, as Hashian agreed, he was "free to come and go from Boston." A4202 at 180. See also A7147-48 at 101-02 (Connie); A4202 at 180 (Hashian); A4408 at 479-80 (Muzzy) ("It was Brad's choice."); A6861 at 793 (Komor) ("Brad expressed to me that one of the things he liked about working with Tom . . . [was] he was free to do what he wanted and do his own projects."). Brad's professional life was not dysfunctional, contrary to the March 16 article. A5133 at 79 (Pam); A7092 at 335 (Micki); A7150 at 114 (Connie). He enjoyed Boston and was looking forward to the potential tour. A1280 at 690; A5135-36 at 87-

91.[10] Brad's own words and actions confirm that he was free to leave. A1386 at ¶ 1132, A1387 at ¶ 1135, A1388 at ¶ 1138-40.

The March 16 headline and article, which conveyed that Scholz's dropping Cosmo from the band "made Delp do it" was also factual and false. A1324 at ¶ 985 (Meg); A5133 at 78-79 (Pam); A6863 at 800 (Komor); A1345 at ¶ 1041. Brad 'did it' for personal reasons that had nothing to do with Scholz. See supra 10-12. Neither Pam, who was Brad's fiancée, nor Barbara Sherry, his business manager, recall Brad expressing any concerns about Scholz, Cosmo, Boston, or his professional life generally in the months before he killed himself. A1321 at ¶ 982; A4920 at 225; A4921

[10] Brad was not "driven to despair" over Cosmo's firing and indeed apparently was not upset in the least over it. See A5133 at 79-80 (Pam); A7150 at 115 (Connie); A5040 at 196-97 (Meg); A6817-18 at 288-89 (Kilbashian); A6863 at 801 (Komor) ("completely ridiculous and absurd"). Brad was not "under pressure" because Cosmo was dropped from the tour. A5103 at 106 (Pam) ("hooey"); A6814 at 273 (Hashian). Brad did not see or speak to Cosmo for nearly 3 years before his death. A1437 at ¶ 1223. More recently, Brad performed successfully with Boston, and without Cosmo, at a major benefit concert only four months before his death. A1436 at ¶ 1220-21, A1440 at ¶ 1228. If more were needed, Brad had been informed 8 days before his death that the tour might not go forward because the band only had three guaranteed weekend dates, making it even more implausible that he would kill himself for that reason. A5876. Brad also never mentioned Fran Cosmo or the potential tour in any of his suicide notes or in his final emails. A1306 at ¶ 943, A1315 at ¶ ¶ 967-977.

at 228-29; A4922 at 233; A5164 at 210. Thus, the Herald's 'opinions' rested on provably false assertions of fact.[11]

The case on which the Superior Court relied is therefore distinguishable. Gacek v. Owens & Minor Distribution, Inc., 666 F.3d 1142 (8th Cir. 2012), was an example of the 'pure' opinion rule which applies when both parties to a communication know the facts or assume their existence and the comment is *clearly based* on those disclosed facts. See, e.g., National Ass'n of Government Emps., Inc. v. Central Broadcasting Corp., 379 Mass. 220, 227 (1979) ("NAGE"). In Gacek, the plaintiff complained to a supervisor about a work schedule of a fellow employee, Showers. After the supervisor called Showers in for questioning, Showers "left that meeting, went home and took his life with a firearm." Id. at 1144. Another co-worker accused Gacek of "push[ing] [Showers] over the edge." The Eighth Circuit affirmed the dismissal

[11] Even if these statements were opinions and not facts, the Herald's falsely attributing those opinions to 'insiders' who did not in fact share those views would itself be defamatory and actionable. See Thomas v. Thomas, 1988 WL 93932, *3 (N.D. Ill. Sept. 8, 1988) ("When statements are falsely attributed to someone, the false attribution can constitute defamation regardless of whether the statements themselves are fact or opinion, true or false."); Action Repair, Inc. v. American Broadcasting Cos., Inc., 776 F.2d 143, 147 (7th Cir. 1985)(false attribution of opinion to judge which he did not hold was actionable).

of Gacek's libel claim because "anyone is entitled to speculate on a person's motives from the known facts of his behavior," and nothing the defendant said implied that he was doing anything other than expressing an opinion based on facts known to all. Id. at 1147-48 (internal quotation and citation omitted). By contrast, the Herald articles directly stated false facts as the basis for the 'opinion' (if that is what it was) and, for good measure, implied the existence of false facts known to "insiders" and 'family' members. Thus, on this basis as well, the articles were defamatory.

C. The Herald Articles, Even If Opinion, are Actionable as Implying Undisclosed Defamatory Facts.

Even if the Herald's statements could be deemed opinion, opinion is still actionable where it implies the existence of unstated defamatory facts. King, 400 Mass. at 717-718. A practical test of whether an opinion rests on undisclosed facts is whether the reader knows or is given complete information. Lyons v. Globe Newspaper Co., Inc., 415 Mass. 258, 263 (1993). The implication that the speaker knows additional damning facts will make an otherwise opinionative statement actionable. NAGE at 227.

Each of the three articles strongly implies the existence of further defamatory and undisclosed facts

in the possession of the very same "insiders" who were allegedly the source of the articles. The implication was particularly strong where the Herald reported that Brad had left behind suicide notes to friends and family, some of them as yet unavailable to the public. A486 at ¶ 3. That is precisely how Judge Cratsley read the articles in connection with the Herald's motion to dismiss. See A155 ("Viewing the articles in their entirety, it is apparent to me that the opinions expressed in them were based on additional nondisclosed defamatory facts"). That is also how the Appeals Court read the March 16 article. See 83 Mass. App. Ct. at 596, n. 6 ("Micki's statements as a whole, and in particular that '[n]o one can possibly understand the pressures he was under,' imply undisclosed facts as their basis.") (citing Lyons). Thus, it cannot be said that a reasonable reader would unarguably regard the articles as pure opinion.

In short, nothing about these articles fits within the parameters of 'opinion' - not the context in which they appeared, not the false facts that filled them, and certainly not the impact they had. The Superior Court erred in holding otherwise, and its judgment must therefore be reversed.

II. The Herald Published Its Articles With Actual Malice

Although the court below did not reach the issue, the Herald also argued that it did not publish its articles with actual malice. Actual malice is a subjective standard. See McNamee v. Jenkins, 52 Mass. App. Ct. 503, 506 (2001). It requires a plaintiff to show that the reporter made or repeated the defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not." Murphy, 449 Mass. at 48. On summary judgment, the plaintiff only needs to show evidence which, if believed, would permit a jury to find actual malice by clear and convincing evidence. Milgroom v. News Group Boston, Inc., 412 Mass. 9, 12 (1992). "The proof of 'actual malice' calls a defendant's state of mind into question . . . and does not readily lend itself to summary disposition." Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979). See also Godbout v. Cousens, 396 Mass. 254, 258 (1985). Here, Scholz's evidence was more than sufficient to demonstrate a triable issue on actual malice.

A. The Herald Fabricated Statements from 'Sources' in Its March 15 Article.

There is no better evidence of actual malice than evidence that the reporter simply made up the 'facts' and quotes in her article. See, e.g., Flowers v. Carville, 310 F.3d 1118, 1131 (9th Cir. 2002); Masson

v. New Yorker Magazine, Inc., 501 U.S. 496, 515-16 (1991); Murphy at 48-49. As to the March 15 article, Fee claimed Geary told her that Brad was "feeling pressure" from being caught between the supposed Boston factions and "that could have led to his decision to end his life." A3857 at 100. See also A1186; A6405 (Fee interrogatory responses). Geary testified that he never told Fee any such thing. See A1187 at ¶ 640; A3985 at 87-88. In fact, as of March 2007 Geary did not believe that Delp killed himself because of his relationship with current or former band members or because Boston was going on tour. A3985 at 86-88.

Boch also never provided any information about "ongoing bitterness" or issues relating to the Flutie benefit, or anything else. See A3435 at 164 ("I didn't discuss this with the Herald."); A1189 at ¶ 645; A3437 at 208 (agreeing that he "didn't provide any information to the Herald in connection with this article," and did not know who the unnamed 'insiders' were in the article).[12] Boch had no idea whether it

[12] If more were needed, both Goudreau and Hashian, whose information Boch allegedly conveyed according to Fee, denied at deposition that they were (directly or indirectly) the source for the articles. See 1189-90 at ¶¶ 646-47. Goudreau has no recollection of speaking to anybody about the information in the March 15 article. A4089 at 189-91. Hashian likewise testified that he did not believe that Brad was in the middle of a bitter breakup of Boston or anything like

was true (as the Herald reported) that "Tom made Brad do the Boston stuff." A3437 at 206 ("It would just be speculating."). Thus, both of Fee's primary 'sources' denied providing her with the information in the article.[13]

The Herald's other "sources" were equally emphatic about not having provided the information. Jeff Myerow, who supposedly said that Delp was caught in a "bitter relationship" between Scholz and ex-Boston sidemen, A6401, *never* had any communications with Fee or Raposa about the relationship between Scholz and Goudreau and Hashian. See A1193-1199; A6876 at 113; A6877 at 114 ("I don't believe I got in the middle of any of that"); A6881 at 170 ("I don't recall discussing any of that"). He never told Fee or Raposa anything about the relationship between Brad and Scholz, in fact. A6880 at 168 ("I don't talk about something I don't know anything about."). According to Fee, Ian Barrett, who occasionally did

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that, and he never told Boch that. A4199 at 167. He also never told anyone that working with both 'factions' put a strain on Brad, because it did not. A4200 at 171-72; A4202 at 178-79. Hence, *both levels* of the double hearsay that Fee supposedly relied upon denied providing the information that Fee claimed they provided.

[13] Even if the Court were to find that Boch and Geary did in fact report the hearsay they were alleged to have reported, Fee and Raposa had no way to know whether Hashian and Goudreau were in fact trustworthy sources about Brad's mental state in his final days. See King, at 400 Mass. at 721-22.

videography for Boch, was supposedly the source for information about Goudreau and Hashian being upset about their exclusion from Boston. A6405. Barrett has no memory of telling the Inside Track that. A6927. Gail Parenteau, the supposed source of the quote that Scholz had "been told nothing about anything," denied providing that quote, and denied telling Fee or Raposa that Scholz had strained relationships with Goudreau and Hashian. Compare A6416 (Fee's interrogatory responses) with A4489 (Parenteau testimony). Connie Goudreau supposedly confirmed what Geary and Boch told Fee. A6411. What Connie actually said was: no comment. A7145 at 42-43. "When the only 'source' of the story did not contain the statements supposedly derived from it, the courts have inferred that the defendant recklessly fabricated the story." Zerangue v. TSP Newspapers, Inc., 814 F.2d 1066, 1071 (5th Cir. 1987). The same is obviously true when *every* 'source' denies it. Thus, Scholz presented a triable issue on whether the Herald published the March 15 article with actual malice.

That Fee's sources denied providing her with information that she claims they provided is also relevant for a second, independent reason. Because actual malice is a subjective standard, the reporter who lies under oath in sworn interrogatories cannot expect a jury to believe her about anything, her own

subjective good faith included. See Murphy, 449 Mass. at 54, 63; Zerangue at 1070-71. Hence, on that basis as well Scholz raised a triable issue on whether the Herald acted with actual malice.

B. The Herald Fabricated or Materially Distorted Many of the Statements Attributed to Micki Delp in the March 16 Article.

The day the March 15 article appeared, Fee spoke to Micki very briefly. A1203 at ¶ 688; A3709 at 576. During that interview, Micki did not say or suggest that Brad was "driven to despair", or that Cosmo's dismissal was the "last straw" in a dysfunctional professional life, A3734 at 684, nor that it "led to" Brad's suicide, A3735 at 690, nor that it "made [him] do it." A3737. As to the report that Brad was "upset over the lingering bad feelings from the ugly breakup of the band BOSTON over 20 years ago," Micki "categorically" denied saying this to Fee, or anything close to it. A3714 at 598.[14] See generally A1349-57

[14] The Superior Court opined in dicta that Micki's 2011 deposition testimony did not materially contradict her prior testimony. See A1777, n.4. The Superior Court, however, was simply wrong because Micki's 2008 testimony leaves no doubt whatsoever that the Herald materially misquoted her. See, e.g., A3714 at 598 ("Q. You categorically deny that you said anything close to [that]? A. Absolutely, absolutely. Q. Do you believe it to be true that Brad was upset over the lingering bad feelings from the ugly breakup of the band BOSTON 20 years earlier? A. No."). Micki also confirmed that the Herald misquoted her in her 2009 summary judgment papers in the case against her. A1358 at ¶ 1064; A6016 at ¶ 12.

at ¶¶ 1051-63. See St. Amant v. Thompson, 390 U.S. 727, 732 (1968) (permitting actual malice to be inferred where information in story is a "product of the [reporter's] imagination"). Thus, the Herald's sole "source" for the March 16 article has specifically and directly denied telling the Herald much of the information that the article reported.

In response, the Herald pointed primarily to Micki's 2011 deposition in which she recanted her prior sworn statements. On summary judgment a court may not choose between which version of Micki's testimony to believe - and, if anything, must accept the earlier, unvarnished version. See Smaland Beach Ass'n, Inc. v. Genova, 461 Mass. 214, 230 (2012) (deposition answers cannot be struck by errata sheets); Ng Brothers Const., Inc. v. Cranney, 436 Mass. 638, 648 (2002); O'Brien v. Analog Devices, Inc., 34 Mass. App. Ct. 905, 906 (1993).[15] At most, therefore, Micki's self-contradictory testimony requires that a jury decide which version to believe.

[15] There are persuasive reasons to believe Micki's first version. In 2010, she entered into a Joint Defense Agreement with the Herald. A1213 at ¶ 714. Micki and the Herald's counsel communicated more than 1400 times by phone in the 22 months prior to her 2011 deposition. Id. at ¶ 715. In return, Micki has received free legal representation, meeting privately with the Herald's counsel on multiple days to prepare for her 2011 deposition. A1214 at ¶ 717. The jury will therefore be justified in viewing her subsequent testimony as carpentered.

Quite apart from the summary judgment standard, Micki's earlier testimony is confirmed by her immediate response to the article and by her friends and family. When she first read the March 16 article, she was "furious" because "it's not what I said." A1353 at ¶ 1055; A3713 at 593. Micki called Fee to complain, telling her "Gayle, you know, I'm stunned by what's in the paper today, and you know I didn't say this." A3715 at 603. Micki also called Pam "very upset" to complain that the Herald had "twisted" what she had said. A5087. See also A5103-04 (Micki was "half hysterical" because "it wasn't what she said.") Micki told Pam that she did not believe that Brad killed himself because of years of bad blood or because of Cosmo's firing. A5101. Micki told Boston guitarist Gary Pihl that her words were "taken out of context to make it sound as if [Scholz] was at fault for Brad's death." A5733 at 62. Micki also told Geary and Connie that she had been misquoted. A3991 at 113-14; A4014 at 173. See Carson v. Allied News. Co., 529 F.2d 206, 213 (7th Cir. 1976) (actual malice may be inferred from "wholly imagined but supposedly precisely quoted remarks"). Since the purported source for the information in the March 16 article denies saying the words or the substance of the key statements the Herald attributed to her, a triable

issue exists on actual malice as to that article as well.

C. Fee and Raposa's Destruction of Their Notes Is Strong Evidence of Actual Malice.

A reporter's destruction of her notes can, without more, support an inference of actual malice. Murphy at 61 (jury may "draw the negative inference that [the Herald reporter] discarded his notebook in a deliberate effort to conceal what he knew were inaccuracies in his reporting.").[16] See A1242-44. Fee and Raposa destroyed their notes at a time when they knew or should have known that the notes could be critical in establishing who said what to whom. See Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119 (7th Cir. 1987). They did so at a time when Micki had already called them to say that she had been misquoted and that they should call their lawyer. A3715 at 603. The Herald even published an article on March 24th discussing the potential for legal action. A6613. Thus, as in Murphy, a triable issue exists as

[16] The Murphy case tried in early 2005, oral argument occurred in February 2007 where note destruction was discussed and the verdict was affirmed in May 2007. Despite being ordered to pay $3 million in damages in Murphy, the Herald took no steps to strengthen its document preservation practices. A1248 at ¶820. Instead, it charged the Justice who authored the Murphy opinion with bias and attacked this Court's "relentlessly one-sided view" of the Herald's reporting. A6663.

to actual malice based upon the destruction of the notes alone.

D. The Herald's Subsequent Repetition of the False Statements in the March 15 and 16 Articles is Further Evidence of Actual Malice.

Evidence that a newspaper repeats a libel after knowing or having reason to know that its story was erroneous constitutes potent evidence of actual malice, not only as to the subsequent publications but as to the original articles as well. "Refusal to retract an exposed error tends to support a finding of actual malice." Zerangue, 814 F.2d at 1071.[17] After Meg's deposition, the Herald published two articles about Brad's suicide. A6706; A6708. Neither of those articles mention the incident with the camera, the emails that followed it, or Meg's wrenching testimony about Brad's last day.[18] Those

[17] For other cases to the same effect, see Sharon v. Time, Inc., 599 F. Supp. 538, 581 (S.D.N.Y. 1984) (failure to report post-publication discovery of evidence that tends to prove falsity of prior report is evidence that reporter "recklessly disregarded the truth" in prior publication); Holbrook v. Casazza, 204 Conn. 336, 339, 528 A.2d 774 (1987) (refusal to retract statement subsequently demonstrated to be false was evidence of actual malice at the time statement was published).

[18] As the Boston Globe correctly described it, the Herald's post-lawsuit reportage "focused on Delp's relationship with Scholz, describing what it says were the singer's negative feelings about Scholz as related by the testimony of numerous witnesses. . . . [But]

same articles also do not inform Herald readers that *none* of Brad's suicide notes (including the private notes produced in the litigation) reference Scholz or Boston or Brad's professional life, nor do they suggest that the Herald's earlier articles might have been incomplete or mistaken. Instead, the Herald used the articles to convey that Scholz had, as a matter of fact, caused Brad to kill himself. "A subsequent act of republication after a defendant is put on notice by a lawsuit that alleges defamation is relevant to a determination of actual malice in the initial publication." Weaver v. Lancaster Newspapers, Inc., 592 Pa. 458, 472, 926 A.2d 899 (2007), citing Herbert v. Lando, 441 U.S. 153, 164 n.12 (1979) (actual malice may be shown by "subsequent defamations"). Thus, the Herald's continuing refusal to inform its readers of the true facts about Brad's death will be evidence of actual malice.

E. Although Micki Acknowledged Saying Some of the Quotes in the March 16 Article, the Herald Nevertheless Published Them with Reckless Disregard for Their Truth or Falsity.

Micki acknowledged that the words appearing with quotation marks around them in the March 16 article were accurately rendered. A7090 at 327, 329; A7091 at

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the Herald has not mentioned Meg Sullivan or the camera." A6275.

334. Those included the second and third paragraphs of the article (about the "pressures" Brad was under) and the quote in the 17th paragraph that "Boston was a job" that Brad "couldn't take any more." A490-91. Nevertheless, the Herald published those statements in reckless disregard of whether they were true or false.

As a threshold matter, one cannot evade liability for defamation merely by quoting *someone else's* defamatory remark. It is a "venerable principle" of defamation law "that a person who repeats a defamatory statement is generally as liable as the one who first utters it," even if the defamatory statement is accurately rendered. Flowers v. Carville, 310 F.3d 1118, 1128 (9th Cir. 2002). See also Cianci, 639 F.2d at 60-61; Jones v. Taibbi, 400 Mass. 786, 792 (1987). Put differently, actual malice looks to the substratal truth of the statement. "Liability for a defamatory statement may not be avoided merely [by] adding a truthful preface that someone else has so stated." Jones at 792. Thus, the mere fact that the Herald quoted Micki correctly some of the time does not preclude a finding that it acted with knowing or reckless disregard for the truth of the information that the quotes convey.

Evidence of the Herald's actual malice includes taking Micki's statements out of context to support the thesis that Scholz 'pressured' Brad to the point

of suicide. See, e.g., Masson, 501 U.S. at 517 (material alteration of statement shows actual malice); Crane v. Arizona Republic, 972 F.2d 1511, 1522 (9th Cir. 1992) (editing quotes given by source to give them a meaning that the source did not intend sufficient for actual malice). Two Superior Court judges have now read the Herald's articles as unfairly and inaccurately rendering the substance of Micki's quotes, primarily by putting arguably harmless statements into a context that made it seem as though Micki was endorsing the substance of the Herald's March 16 article. See A3007-09 (Cratsley, J.); A1768-70 (McIntyre, J.) (agreeing with Cratsley analysis).[19] Whether the Herald's context created a "material change in meaning conveyed by statement" is "one for the jury . . . to make". Murphy at 57 (quoting Masson, 501 U.S. at 517). Thus, a triable issue exists whether the Herald twisted Micki's words to make them defamatory.

Moreover, both stories were plainly based on a preconceived conclusion. See Goldwater v. Ginsburg, 414 F.2d 324, 337 (1969) (use of innuendo and statements taken out of context supported a finding of

[19] In reversing Judge Cratsley's decision, the Appeals Court agreed that there was a triable issue as to whether the defamatory sting of the March 16 article was supplied by Micki's comments or by the Herald taking them out of context. See 83 Mass. App. Ct. at 593-94.

actual malice where it could be inferred that they were part of a "predetermined result"). The coercive (or at very least highly leading) interview that Fee conducted with Micki, combined with Micki's denial that she said Brad's suicide was related to band conflict, likewise shows actual malice. See Suzuki Motor Corp. v. Consumers Union of the U.S., Inc., 330 F.3d 1127, 1139 (9th Cir. 2002), cert. denied, 540 U.S. 983 (2003) (actual malice found where publication set out with a preconceived plan and shaped the facts to fit the story). Thus, there was a sufficient basis for a jury to infer that Fee set out in the March 16 article to confirm her prior reporting regardless of Delp's actual statements.

Even if the Herald had put the quotations in an accurate context, it relied on a source who had openly threatened to "make sure that Brad's suicide is pinned" on Scholz. A4490 at 531. Actual malice can be found where "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." King, 400 Mass. at 722. While doubts about the veracity of a witness is not itself sufficient to prove actual malice, the Herald accepted Micki's statements as corroborating a story which (Fee acknowledged in the WAAF interview) was implausible on its face. See A6227 (acknowledging that she thought 20 year old band tensions "couldn't possibly be the

reason" for Brad's suicide). See Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 869 (1975) (where paper's editor entertained doubts as to story's accuracy, jury question existed as to actual malice); Stern v. Cosby, 645 F. Supp. 2d 258, 279 (S.D.N.Y. 2009) (where author "ignored the inherently improbable nature of the [statement] in her zeal to write a blockbuster book," issue of material fact existed regarding actual malice). Thus, even supposing that Micki said what the Herald claimed she said, the paper was reckless in publishing those charges.

Finally, the Herald never asked Pam or Meg Sullivan (one of whom was engaged to Brad and the other of whom lived with him) to verify the information in its articles. If asked, both of them would have testified that the articles were just wrong. See A5123 at 33-36; A5042 at 202-03. Fee also knew that Pam and Micki had received private suicide notes, but did not ask either one about their contents despite Parenteau's explicit warning not to trust Micki without verifying what was in the notes. A3907 at 326-27. When substantial doubts have been raised as to the truthfulness of a reporter's information, the "purposeful failure to investigate . . . may be proof of actual malice." Murphy, 449 Mass. at 60. Combined with the inherent unlikelihood that Brad had killed himself because of Cosmo's firing or band

tensions from 20 years earlier, that too was independent evidence of actual malice.

In short, even if the Court inverted the summary judgment standard and looked at the evidence in the light most favorable to the Herald, this was an exercise in tabloid journalism at its absolute worst. A person killing himself because of personal problems that followed years of depression does not sell papers, and the Herald, beset by years of falling circulation, was plainly not about to let the truth get in the way of a good story. The very definition of actual malice, however, is when a person makes her "accusations based on suspicions and not facts." Tosti v. Ayak, 394 Mass. 482, 493 (1985). By any reckoning, the Herald's articles *at least* met that standard.

III. Scholz Presented A Triable Claim for Intentional Infliction of Emotional Distress

The court below dismissed Scholz's intentional infliction of emotion distress ("IIED") claim because in the absence of actionable defamation, the necessary predicate for an IIED claim (extreme and outrageous conduct) is lacking. As explained above, however, Scholz has stated a case for defamation, including defamation based on fabricated 'facts.'[20] That conduct

[20] Scholz does not dispute that he has no viable IIED claim if his defamation claim fails.

meets the "extreme and outrageous" standard. See Cady v. Marcella, 49 Mass. App. Ct. 334, 341 (2000)(course of conduct that included filing a collection action which led to media coverage about plaintiffs' alleged non-payment of bills); Tech Plus, 59 Mass. App. Ct. at 26 (false allegation of making anti-Semitic remarks sufficient for "extreme and outrageous" conduct). Thus, that element of an IIED claim is present.

The court below also erred in dismissing the claim on the basis that Scholz "has no reasonable expectation of proving causation or damages" because his "ailments are identical to ailments he had prior to the publication of the articles." A1779. In fact, the Herald articles exacerbated symptoms that had been under control and caused a resurgence of those that had receded. A1545 at ¶¶ 117, 118. The majority of Scholz's 'ailments' were precisely the sort of symptoms that typically accompany severe stress. A1547 at ¶¶ 121, 122. If an injury "causes or contributes to cause the development of a pre-existing [condition], the person liable for the injury is also liable for the resulting aggravation." Wallace v. Ludwig, 292 Mass. 251, 256 (1935). See also McGrath v. G & P Thread Corp., 353 Mass. 60, 63 (1967) (defendant "responsible for the combined effects of his wrongful act and a preexisting disease or condition."). Scholz's medical records clearly

documented the aggravation (or resurgence) of his symptoms. See A1575-77; A1584-86 at ¶¶ 190, 192-93; A1588 at ¶ 199; A1594-97. "The question of causation is generally one of fact for the jury." Mullins v. Pine Manor College, 389 Mass. 47, 58 (1983). Thus, Scholz presented a triable claim for IIED.

IV. The Superior Court Erred in Allowing Over $130,000 in Deposition Costs

Under Mass. R. Civ. P. 54(e), the allowance of deposition costs is "subject to the discretion of the court, but in no event shall costs be allowed unless the court finds that the taking of the deposition was reasonably necessary, whether or not the deposition was actually used at trial." Proposed costs must be given "careful scrutiny" and an award requires "an express finding of reasonable necessity." Waldman v. Am. Honda Motor Co., 413 Mass. 320, 328 (1992) (internal quotation omitted). Even if the judgment stands, the award of costs must be reversed.

The Superior Court erred in three discrete ways. First, it applied the wrong standard. The test for 'reasonable necessity' is objective. "[T]he relevant inquiry is the use to which the discovery is put once obtained and whether the costs were necessary to the resolution of the case". Gochis v. Allstate Ins. Co.,

162 F.R.D. 248, 251 (D. Mass. 1995).[21] Thus, the standard of reasonable necessity requires the "application of twenty-twenty hindsight to the conduct of the parties" in determining what was or was not necessary for the disposition of the case. Gochis at 251, citing Templeman v. Chris Craft Corp., 770 F.2d 245, 249 (1st Cir), cert. denied, 474 U.S. 1021 (1985). The Superior Court, however, used a subjective standard, and looked to whether the taking of the deposition was reasonable at the time. See A1999. An error of law apparent on the record is an abuse of discretion. Cooper v. Cooper, 62 Mass. App. Ct. 130, 134 (2004).

Second, under any standard, the Herald's deposition costs were not necessary to the disposition of the case. The Superior Court's decision rested on

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[21] Mass. R. Civ. P. 54(e) appears to be more restrictive than its federal counterpart insofar as it provides that costs should presumptively *not* be taxed unless the prevailing party shows reasonable necessity. Even under the more liberal standard prevailing in the federal courts, deposition costs should not be awarded unless they were "actually utilized by the court in considering the motion for summary judgment." Merrick v. Northern Natural Gas Co., 911 F.2d 426, 434-35 (10th Cir. 1990). See also Fressell v. AT&T Technologies, Inc., 103 F.R.D. 111, 118 (N.D. Ga. 1984) ("Considering . . . the strong policy of the American system against the shifting of litigation expenses," the party seeking reimbursement must show how the depositions were "necessary for the court's disposition of the [summary judgment] motion.").

a simple reading of the Herald's articles.[22] There was no need to consult any depositions, and certainly not all of them. Because the court applied the wrong standard (and applied that standard wrong), its decision must be reversed.

The third and most serious error was the Superior Court's asserted policy grounds. It reasoned that "costs associated with extended defamation litigation may impact First Amendment rights" and that the "threat of expensive litigation could put litigious persons of public interest beyond media commentators because of the feared expense." A2001. There is no authority anywhere, however, for the proposition that shifting costs is the way to accomplish that goal. To the contrary, in the American system each party presumptively pays its own costs. See, e.g., Waldman at 321-22. For that reason as well, the Superior Court abused its discretion in improperly invoking a public policy basis for shifting the costs of the transcripts.

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[22] In so doing, the Court below followed the advice of the Herald's counsel, who repeatedly informed the Court that "examination of these articles is all that's required. You have been given boxes of transcripts . . . You can ignore all of these boxes, as far as I'm concerned, unless you're otherwise moved." A7356. See also A7357 ("You can ignore all of their boxes. And by the same token you can ignore all of our boxes.").

Conclusion

For each of the foregoing reasons, this Court should reverse the Superior Court's judgment and remand for trial. In the alternative, it should vacate the Superior Court's award of costs and remand for further proceedings.

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Date: March 11, 2014

CERTIFICATE OF COMPLIANCE

I, Nicholas B. Carter, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

Nicholas B. Carter