COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

NO. 2012-P-0450

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

v.

MICKI DELP,
Defendant/Appellee

**ON APPEAL FROM A JUDGMENT OF
THE SUFFOLK SUPERIOR COURT**

REPLY BRIEF OF PLAINTIFFS/APPELLANTS DONALD THOMAS SCHOLZ and THE DTS CHARITABLE FOUNDATION, INC.

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The defendant below and appellant here, Micki Delp, has submitted a brief which imaginatively recreates the record before the Superior Court, describing as 'undisputed' matters which were the subject of sharp dispute and persistently citing evidence that the Superior Court was obliged to disregard because it was directly contradicted by other evidence that was favorable to the non-movant, Mr. Scholz.[1] Ms. Delp's brief also consistently refuses to acknowledge her daunting burden on summary judgment. All disputed issues of material fact must be resolved in the favor of the non-movant. See Salvo v. Ottaway Newspapers, Inc., 57 Mass. App. Ct. 255, 259 (2003). Even where facts are undisputed, "[w]here a jury can draw opposite inferences from the evidence, summary judgment is improper." Flesner v. Technical Commns. Corp., 410 Mass. 805, 811-812 (1991). As discussed below, however, when the record is viewed and inferences are drawn in the light most favorable

[1]Ms. Delp's attempt to recreate the factual record is particularly futile in light of her refusal to respond to Mr. Scholz's Statement of Additional Material Facts submitted in connection with Ms. Delp's original summary judgment (A178 - 202). Ms. Delp offers no explanation whatsoever for why she failed to respond even as her summary judgment motion went through multiple rounds of briefing. Her brief does not controvert Mr. Scholz's position that, under Superior Court Rule 9A(b)(5), those facts are all deemed admitted.

to Mr. Scholz, the Superior Court erred in entering summary judgment in Ms. Delp's favor.

I. Ms. Delp's Statements to the Herald Were 'Of and Concerning' Mr. Scholz and Had a Defamatory Impact

Ms. Delp's primary contention is that her statements were not 'of and concerning' Mr. Scholz because they "do not even mention him, and . . . manifestly are Micki's views of her deceased former husband's state of mind." Delp Brief at 18.[2] That is not a correct characterization either of her remarks or of the law. "Under Massachusetts law, a statement need not explicitly refer to the plaintiff to constitute defamation." Stanton v. Metro Corp., 438 F.3d 119, 128 (1st Cir. 2006). Thus, where a newspaper published the photograph of an attorney to accompany a newspaper article about construction kick-backs, the attorney had a case for libel, even though "[n]o reference to the plaintiff was made during the course of the article." Mabardi v. Boston Herald-Traveler

[2]Ms. Delp's argument that her statements were not defamatory is purely derivative of the claim that they are not about Mr. Scholz. Delp Brief at 30-33. Ms. Delp does not anywhere argue that stating or insinuating that someone caused another person's suicide would not harm that person's reputation. See Rutt v. Bethlehems Globe Publ. Co., 335 Pa. Sup. Ct. 163, 174, 484 A.2d 72 (1984); MacRae v. Afro-American Co., 172 F. Supp. 184, 186 (E.D. Pa. 1959), aff'd, 274 F.2d 287 (3d Cir. 1960), cited in Mr. Scholz's Brief at 21. Thus, the argument is waived.

Corp., 347 Mass. 411, 412 (1964). Based solely on the juxtaposition of the photo and the headline, the Mabardi court found that "[t]he inference could have been drawn by a large number of readers that the plaintiff was involved in the wrong-doing . . . And while the inference may not be a necessarily rational one, we cannot say that a considerable segment of the community would not make it." Id. at 414. See also Reilly v. Associated Press, 59 Mass. App. Ct. 764, 777 (2003). These cases are not exceptional, but rather represent the well-settled rule that "[a] defamatory comment is made 'of and concerning' the person to whom the reader or recipient, correctly or mistakenly but reasonably, understands it was intended to refer." Reilly at 778. If more than one inference can be drawn, the jury must do it. Id. at 777-778.

Accordingly, to say that Micki's statements were only "about Brad's mental state", as the Superior Court did, is to take an unduly narrow view of the statements. Of course the comments were in some measure about Mr. Delp's mental state, but they attributed his mental state and his actions to specific events.[3] Ms. Delp's cases therefore miss the

[3]For example, Ms. Delp made the very specific claim that "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." A781 (emphasis supplied). Given that it was common knowledge Mr. Scholz was the one telling Mr. Delp what to do, and that Ms. Delp's

point. This was not a situation where the plaintiff is part of an uncertain group such that comments about the group cannot reasonably be thought to identify the plaintiff, as in Driscoll v. Board of Trustees of Milton Academy, 17 Mass. App. Ct. 285, 298-99 (2007). BOSTON was a famous rock band, its members were well known to the public, and Mr. Scholz's role as BOSTON's "mastermind" (to quote Ms. Delp's own Fact Statement) was also well known. A172 at ¶ 11. As Ms. Delp put it at deposition, "Tom is BOSTON." A309. That some of Ms. Delp's comments might also be construed as suggesting that Mr. Goudreau or Mr. Hashian or other BOSTON band members might have also been to some degree at fault for Mr. Delp's death is, for present purposes, neither here nor there. A construction that Mr. Scholz *shared* responsibility for Mr. Delp's suicide is still libelous, since Mr. Scholz had nothing to do with Mr. Delp's death.

Ms. Delp deals with the large number of individuals who regarded her remarks as blaming Mr. Scholz for Mr. Delp's death by minimizing the factual record and misconstruing its significance. As Mr. Scholz discussed in his opening brief, it was not merely anonymous internet posters who read the

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own Fact Statement acknowledged as much, there can be no reasonable doubt about who dragged Mr. Delp to the point where he couldn't take it any longer. See A172 at ¶ 11; Scholz Brief at 24-26.

articles as blaming him for Mr. Delp's death.[4] See Scholz Brief at 26-29. Rather, individuals close to the band, individuals that Mr. Scholz met in his daily life, and other media outlets all had the same reaction. Id. Ms. Delp does not come forward with even a single person who reads the articles in any different manner.[5] Ms. Delp's own sister thought the article "says what Micki . . . wanted to get across without naming Tom." A933. Ms. Delp's comments must be read "not with the close precision expected from lawyers and judges but as they would be read and understood by the public to which they are addressed". Stanton at 127 (internal quotation and citation omitted). The public understood the remarks to be about Mr. Scholz.

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[4]Ms. Delp complains that the internet postings are "inadmissible," Delp Brief at 28, but she never objected or raised the issue with the Superior Court in any form. To the contrary, many of the internet postings that Mr. Scholz relied on were contained in his Statement of Additional Material Facts to which Ms. Delp declined to respond. See A186-188.

[5]Ms. Delp insists repeatedly that she is only responsible for her comments, and not the context that the Herald supplied for those comments. Mr. Scholz concedes that Ms. Delp may be able to raise a triable issue if she can demonstrate that her words were twisted or taken out of context, but on this record there is no possible basis for that conclusion. Ms. Fee's affidavit insists that her article fairly reflects what she was told, A413, and in the current posture of the case must be deemed conclusive on the point. See Scholz Brief at 21-22; infra at 12-13.

Finally, Ms. Delp argues that she did not intend to refer to Mr. Scholz in her remarks. The issue of Ms. Delp's intent is inherently unsuited to summary disposition, Flesner at 809, and Mr. Scholz does not necessarily even shoulder that burden. See New England Tractor-Trailer Training of Conn., Inc. v. Globe Newspaper Co., 395 Mass. 471, 478 (1985) ("the plaintiff need not prove that the defendant 'aimed' at the plaintiff . . . [if he can] prove that the defendant was negligent in writing or saying words which reasonably could be understood to 'hit' the plaintiff"). In any event, there is persuasive record evidence of Ms. Delp's intent. As discussed in Mr. Scholz's opening brief, Ms. Delp twice announced that she was going to 'get' Mr. Scholz. She then affirmatively called a reporter who had already published a libelous article about Mr. Scholz to pour gasoline on the fire. That surely suffices to raise a disputed issue on intent. See Scholz Brief at 10-11, 27-28. Accordingly, there was at least a triable issue about whether Ms. Delp's remarks were "of and concerning" Mr. Scholz.

II. Mr. Scholz Adduced Sufficient Evidence of Actual Malice to Raise a Triable Issue About Whether Ms. Delp Knew that Her Statements Were False When She Spoke Them or Whether She Spoke with Reckless Disregard for the Truth

In his opening brief, Mr. Scholz argued (and Ms. Delp does not seriously dispute) that plaintiffs can, and most will, establish actual malice by cumulation and inference. See Scholz Brief at 35-36. See also Murphy v. Boston Herald, Inc., 449 Mass. 42, 57-58 (determination of actual malice "may be based upon circumstantial evidence"); Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 868 (1975); Bose Corp. v. Consumers Union of U.S., Inc., 692 F.2d 189, 196 (1st Cir. 1982), aff'd 466 U.S. 485 (1984)("an accumulation of the evidence and appropriate inferences" will suffice to show actual malice).

Ms. Delp spends much of her brief attempting to convince this Court that actual malice is a more demanding standard than it is. The plaintiff need not convince *the Court* by clear and convincing evidence that actual malice exists, because courts do not weigh evidence on summary judgment. Rather, Ms. Delp must show by undisputed facts that the *trier of fact* could not possibly find actual malice by clear and convincing evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986); Mulgrew v. City of Taunton, 410 Mass. 631, 633 (1991) (movant must meet "usual burden" on summary judgment); Suzuki Motor Corp. v. Consumers Union of the U.S., 330 F.3d 1110, 1132 (9th Cir.), cert. den., 540 U.S. 983 (2003). Thus, a defendant in a defamation action cannot "automatically

insure a favorable verdict by testifying that he published with the belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith." St. Amant v. Thompson, 390 U.S. 727, 732 (1968).[6]

Despite Ms. Delp's protestations of good faith, many of the statements in her brief are simply not supported by the 'evidence' she cites. For example, Ms. Delp claims to have had "lengthy conversations" with Mr. Delp including one only eight days before he took his life. See Delp Brief at 36-37, citing A312-313, A815-818, and A1074-75. But Ms. Delp's affidavit (A1074-75) contains only the vaguest and most conclusory assertions about such communications. The only conversation that was the source of the information she conveyed to the Herald was in

[6]As Ms. Delp points out, actual malice is a subjective standard, but in the current posture of the case, this fact cuts against her. Because "proof of 'actual malice' calls a defendant's state of mind into question . . . it does not readily lend itself to summary disposition." Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979). When it comes to intent, "much depends on the credibility of the witnesses testifying as to their own states of mind. In these circumstances, the jury should be given an opportunity to observe the demeanor, during direct and cross-examination, of the witnesses whose states of mind are at issue." Flesner at 809 (internal quotation and citation omitted). See Murphy at 53, 58 (upholding actual malice finding where defendant was "thoroughly and convincingly impeached at trial showed a "lack of candor on the witness stand".

November, 2006 - *about four months* before Mr. Delp's suicide. See A625. The "lengthy conversation" they had "just 8 days before [Mr. Delp] took his life," which allegedly "fulsomely supported [Mr. Delp's] statements to the Herald" (Delp Brief at 37) was nothing of the sort. Rather, it was "just a normal pre-tour conversation" (A314) in which they discussed matters that had nothing to do with the subject of her comments to the Herald. See A312-313. Ms. Delp's other cite refers to an incident where Mr. Scholz allegedly screamed at the band after a bad performance. A815-818. The incident happened nearly 30 years ago. Id. See also A620-622. Thus, the record does not support Ms. Delp's assertions.

Moreover, when one compares Ms. Delp's account of what Mr. Delp told her in those conversations with what she told the Herald, the discrepancies themselves suffice to show bad faith and actual malice. See Murphy, 449 Mass. at 59 (discrepancy between source of information and the defendant's version of it showed actual malice); Lyons v. New Mass Media, Inc., 390 Mass. 51, 57 (1983) (a "major basis for inferring actual malice involves examination of the sources" of the defamatory statement). What (supposedly) "upset" and "embarrassed" Mr. Delp was the fact that he performed with BOSTON at the Doug Flutie benefit concert in September 2006, and as a result Mr. Delp

said that he planned to quit the band. A214. He didn't say he was going to kill himself, even by Ms. Delp's self-interested recollection. Id. But four months later, Mr. Delp had not quit the band; he was happily preparing to go out on tour. A192-93; A441-42 at ¶ 4; A850; A854-55; A861-62. When it came time to talk to the Herald, however, Mr. Delp's four month old threat (which he never carried out) apparently became the comment that BOSTON is "just a job" which Mr. Delp "couldn't do anymore." A142. Hence, even taking her own claims about what Mr. Delp told her at face value, Ms. Delp took four-month old (or, at times, almost *30 year old*) information, significantly altered the substance of what she was told, and reported it to the Herald. This sort of distortion has routinely been found to constitute knowing or reckless disregard for the truth.[7] See, e.g., Masson v. New Yorker Magazine,

[7]Ms. Delp also claims that Mr. Delp told her in November 2006 that he was unhappy that Fran Cosmo had been fired. Delp Brief at 37-38; A214. Mr. Delp probably never said any such thing; he was not especially close to Mr. Cosmo, and never expressed any dissatisfaction to his band mates about his departure. A503 at ¶ 5; A850-851; A854 at ¶ 3; A862 at ¶ 6. Certainly Ms. Delp had no basis to take those November 2006 statements (if they were even made) to allege that in March 2007 Mr. Delp was "driven to despair" by Mr. Cosmo's disinvitation. See Rebozo v. Washington Post Co., 637 F.2d 375, 382 (5th Cir. 1981) ("resolution of the obvious ambiguity" in order "to cast plaintiff . . . in the worst possible light" created jury question on actual malice); Warford v.

Inc., 501 U.S. 496, 515-516 (1991)("material change in meaning" between source and report showed actual malice).

Ms. Delp attempts to bootstrap her own statements about Mr. Delp's alleged deep dissatisfaction with his continued involvement with BOSTON by citing to testimony from others who professed to have the same view.[8] However, "defamation is not a question of majority opinion". Stanton, 438 F.3d at 126, quoting Restatement (Second) of Torts § 559 comment e (1977). Ms. Delp's friends who testified in her favor at deposition cataloged Mr. Delp's alleged dissatisfaction with Mr. Scholz and BOSTON, but none of them made the critical leap of asserting that it had anything to do with Mr. Delp's suicide. See A1184

Lexington Herald-Leader Co., 789 S.W.2d 758, 773 (Ky. 1990)(same).

[8]Specifically, Ms. Delp claims that 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." Delp Brief at 11, n.7. But Ms. Delp never gave any such testimony. Ms. Delp *never* testified to that effect at deposition. See A295-354; A603-672; A837-842; A989-994. Her vaguely worded affidavit (A1074-75) is not to the contrary, and certainly never says what she learned, when she learned it, or from whom she heard it. Mr. Frary, Mr. Faulkner, and the others never claim that they related any of their anecdotes to Ms. Delp. See A1083-1117, A1452-70, A1503-10 (Faulkner); A707-729, A1512-14 (Frary).

at 27 (Frary) ("I never thought he'd be suicidal"); A1486 (Faulkner).[9]

In apparent recognition of the fact that Ms. Delp's denying that she said many of the things that she in fact told the Herald would be highly persuasive (and likely dispositive) evidence of actual malice, Ms. Delp attempts to imaginatively reconstruct the record so that she and the Herald do not *really* disagree about what she said. See Delp Brief at 40-41. But they do disagree. The claim that the Herald did not use quotation marks around two of the offending paragraphs in order to show that Ms. Delp did not really say them is just Ms. Delp's way of reading the articles; there is no citation to any record source about what the Herald meant. Further, what the Herald *said* in those paragraphs was:

> 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

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[9] Mr. Faulkner wrote to Cindy Scholz, Mr. Scholz's ex-wife, immediately after Mr. Delp's death that it had been "one of the worst weeks of his life" because he not only lost "his closest friend" he then had to "witness a [controversy] in the media" as the "Inside Track hoes spread all kinds of [stuff] and denigrate Brad's memory and the images of Brad's family and Tom." A1486 (profanities omitted). Thus, there was a dispute about whether Mr. Faulkner's deposition testimony was a contrivance, as Mr. Scholz's response to Ms. Delp's supplemental fact statement discussed at length. See A1288-1331.

> that ultimately led to the sensistive frontman's suicide, **Delp's ex-wife said.**
>
> **According to Micki Delp,** Brad was upset [at the time of his death] over the lingering bad feelings from the ugly breakup of the band Boston over 20 years ago.

A117; A118. Ms. Delp did not simply deny saying those words; she said that the substance of them was simply flat-out wrong. See A174 (Delp Statement of Material Facts) at ¶ 11 (stating that story was "inaccurate"); A842 ("[D]id you say anything similar to that? A. No, not a word."); id. ("Do you believe it to be true, that Brad was upset over lingering bad feelings from the ugly breakup of the band BOSTON 20 years earlier? A. No."); A332 (denying that Mr. Delp's professional life was dysfunctional); A339 (denying that the 'snub' of Fran Cosmo drove Mr. Delp to despair; "I never said that."). Indeed, Ms. Delp even acknowledged under oath that she didn't really know why Mr. Delp killed himself - a fact which all by itself shows actual malice. A354 ("I have no idea"). See Scholz Brief at 42-44; Guam Fed. of Teachers, Local 1581, of Am. Fed. of Teachers v. Ysrael, 492 F.2d 438, 439 (9th Cir. 1974) (finding that where defendant "admitted that he did not know whether what he said was true" that jury question existed on actual malice). For her part, Ms. Fee insisted that she got it right. A413-414. The claim that Ms. Delp and the Herald are 'in agreement' about this is "to indulge in Humpty-Dumpty's use of

language." Cianci v. New Times Pub. Co., 639 F.2d 54, 64 (2d Cir. 1980).

In short, Mr. Scholz in his initial brief demonstrated at length that actual malice could be inferred from (i) Ms. Delp's denying under oath that she told the Herald what she plainly did tell it; (ii) Ms. Delp's other false statements under oath; (iii) her destruction of Mr. Delp's suicide notes to her and her children, apparently while she was under a court order to preserve them; [10] (iv) her admission under oath that she had no idea why Mr. Delp killed himself, despite telling the Herald that she knew why he did; and (v) falsely overstating the basis for her accusations. See Scholz Brief at 35-48. *Combined with* the clear evidence of Ms. Delp's personal animosity toward Mr. Scholz, a jury could find that Ms. Delp either completely fabricated her statements to the Herald or uttered them for reckless disregard

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[10] See A15 at entry #17. Ms. Delp argues that the destruction of Mr. Delp's suicide note was harmless because she acknowledged at deposition that the suicide note did not blame Mr. Scholz. Delp Brief at 44-45. But that is not the point. The destruction of the note can, *by itself*, show consciousness of guilt. Murphy at 61. Moreover, there is no reason to believe Ms. Delp's account of what the note said; it might not only have failed to mention Mr. Scholz, it might have affirmatively informed Ms. Delp of why Mr. Delp did kill himself. Ms. Delp simply cannot destroy critical evidence and then claim that her actions were harmless because she can provide a self-serving memory of what the evidence was.

for whether they were true or false. Nothing more is required for actual malice.

III. Each of Ms. Delp's Statements Were Factual in Nature, or, at a Minimum, Implied the Existence of Defamatory Facts

As an alternative basis of upholding Judge Cratsley's decision, Ms. Delp urges that her statements were "classic opinions" in that they were "inherently subjective interpretations of the state of mind of a deceased person". Delp Brief at 46. Even if this were so - and it isn't - it is well established that there is no "wholesale defamation exemption for anything that might be labeled 'opinion'." Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990). As the Milkovich court put it:

> If a speaker says, "In my opinion, John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar."

Milkovich, 497 U.S. at 18-19. If "the average reader could understand the allegedly libelous statement as either fact or opinion, the determination is for the

jury." Myers v. Boston Magazine Co., Inc., 380 Mass. 336, 339-40 (1980).

As discussed in Mr. Scholz's opening brief, many of Ms. Delp's statements were demonstrably factual in nature. See Scholz Brief at 33-35; Lyons, 390 Mass. at 60 (statements deemed factual where their "meaning was neither imprecise nor open to speculation"). The statements that Mr. Delp was "driven to despair" by Mr. Cosmo's firing and that he was upset by the "lingering bad feelings" from 20 years ago were just wrong. Supra. The statement that BOSTON was "just a job" to Brad which he "just couldn't do anymore" was likewise specific, factual, and false; Mr. Delp loved BOSTON, he loved playing music, and he was looking forward to the upcoming tour.[11] See A193 at ¶ 60; A441-42 at ¶ 4; A503; A505 at ¶ 15; A512 at ¶ 4; A850; A851 at ¶ 9; A854-55; A861-62. As Mr. Delp's former fiancé put it, other than "typical complaints about work", Mr. Delp never said "that Tom [Scholz] pressured him to do anything", nor could she recall "Brad ever complaining to me or in my presence about

[11]Indeed, Ms. Delp acknowledged at deposition that many of the statements she made were simply false, not only in the sense that she did not say them but in the sense that they were, as a matter of fact, wrong. Supra. If Ms. Delp herself could understand those comments as factual (and false), it cannot be said that a jury cannot reasonably understand them the same way.

Tom Scholz". A442. Statements that are false are not opinion. Lyons at 60. Ms. Delp's statements were false.

Ms. Delp's statements were also based on undisclosed and defamatory facts.[12] See Orlando v. Cole, 76 Mass. App. Ct. 1112 (table), 2010 WL 479767 (February 12, 2010)(lawyer's statement that affidavit was "inaccurate" and "deceitful" could be defamatory because "based on undisclosed defamatory facts"). To take the most obvious example, none of the 'facts' alleged in connection with Ms. Delp's actual malice argument can be found anywhere in her remarks. The Herald's readers might have had a different view of Ms. Delp's statements if they had known that a thirty year old incident in which Mr. Scholz screamed at the band on an airplane was part of the basis for the claim that Mr. Delp 'just couldn't do it anymore'. See Delp Brief at 37-38, citing 816-818; A620-21. Hence, Ms. Delp is not entitled to summary judgment based on her (incorrect) claim that she was offering her opinion.

Ms. Delp's re-characterization of her own statements also ignores the "totality of the context in which it was uttered or published". Reilly, 59 Mass. App. Ct. at 770 (internal quotation and citation

[12] That was the basis for the Superior Court's denial of the Herald's motion to dismiss. A559.

omitted.) Ms. Delp knew she was speaking to a reporter for a story that would appear in a newspaper. Her remarks were not made in connection with a heated political debate or indeed any debate at all. She was the possessor of a non-public suicide note, someone who presumably had insight into the facts that would explain Mr. Delp's actions.[13] "There was neither imprecision in meaning nor anything in the context of the [statements] that suggested that [the statements were] not factual." King v. Globe Newspaper Co., 400 Mass. 705, 717 (1987). Ms. Delp is therefore in no position to complain that her remarks were reported as fact and were viewed by reasonable readers as fact.

The cases which Ms. Delp cites are not on point. See, e.g., Driscoll, 70 Mass. App. Ct. at 296-98. In that case, a private school expelled five male students for engaging in simultaneous sexual activity with a single female. Id. The school wrote a letter to parents stating that the 5 to 1 ratio of boys to the single girl "*by definition* represent[ed] a

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[13] As Judge Friendly observed in Cianci, "Almost any charge of crime, unless made by an observer and sometimes even by him, is by necessity a statement of opinion. It would be destructive of the law of libel if a writer could escape liability for accusations of crime simply by using, explicitly or implicitly, the words 'I think'." 639 F.2d at 64 (citation omitted). Ms. Delp did not literally accuse Mr. Scholz of a crime, but the level of alleged wrongdoing at issue is such that the observation applies here as well.

pressurized situation, which the boys *should have known*." Id. (emphasis supplied). The Driscoll court found that the facts disclosed in the letter were complete and accurate and that the qualifying terms "by definition" and "should have known" constituted "proof that the school is expressing its opinion rather than stating an undisclosed fact about the boys." Id. at 297. Here, by contrast, Ms. Delp's comments did imply the existence of undisclosed facts, many of which were false and defamatory.

The other case that Ms. Delp relies on also cuts against her. See Gacek v. Owens & Minor Distribs., Inc., 666 F.3d 1142 (8th Cir. 2012). Gacek is an identifiable example of the 'pure' opinion rule which applies "when both parties to the communication know the facts or assume their existence and the comment is *clearly based* on those assumed facts and does not imply the existence of other facts in order to justify the comment." Restatement (Second) of Torts § 566, comment b (1977) (emphasis added).[14] Ms. Delp was not "speculating on a person's motives from the known

[14]In that case, the plaintiff Gacek complained to a supervisor about the work schedule of a fellow employee, Showers. Id. at 1144. A supervisor "caused Showers to be summoned at the end of his shift for questioning. Showers left that meeting, went home, and took his life with a firearm." Id. One of Showers' co-workers, Mattson, later accused Gacek of "push[ing] Showers over the edge" and "was the reason for [Showers'] death." Id.

facts of his behavior." Id. at 1147-48, quoting Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1993). Rather, she put herself forward as the insider who knew what the public did not.[15]

In short, Ms. Delp's remarks were not, as in Driscoll, a measured judgment based upon fully disclosed and true facts with which readers could agree or disagree. And they were not, at the other extreme, heated epithets flung in the course of an argument on the factory floor, where there was no implication that the speaker possessed additional inside information. Thus, Ms. Delp's comments were actionable even if they somehow qualified as 'opinion'.

CONCLUSION

For each of the foregoing reasons, the judgment of the Superior Court should be reversed and the case remanded for further proceedings.

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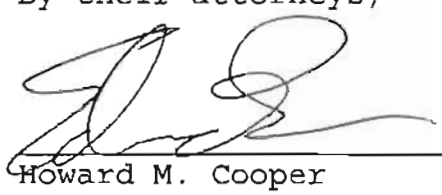
[15] Gacek (as with Haynes, the case on which it relies) applied the hornbook rule that where "it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable." Haynes, 8 F.3d at 1227. Everyone on the factory floor knew that the co-worker had killed himself immediately after being summoned to his supervisor's office; neither Mattson nor anyone else claimed to have actual verifiable facts beyond that.

Respectfully submitted,

DONALD THOMAS SCHOLZ and
THE DTS CHARITABLE
FOUNDATION, INC.

By their attorneys,



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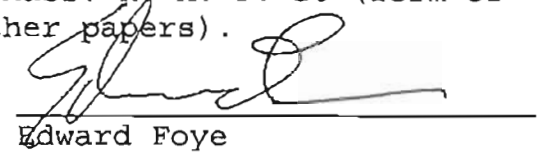
CERTIFICATE OF COMPLIANCE

I, Edward Foye, hereby certify that the foregoing reply 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) (reference 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).



Edward Foye