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 APPELLATE REVIEW OF A JUDGMENT OF THE SUFFOLK SUPERIOR COURT

REPLY BRIEF OF THE PLAINTIFF-APPELLANT DONALD THOMAS SCHOLZ

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The Boston Herald has filed a brief which describes in detail the news stories that it wished it had written about the suicide of Brad Delp. To read the Herald's most recent attempt to justify the unjustifiable, one would suppose that the March 15 and 16 articles (the July 2 article has vanished into the air, apparently) were fair and balanced accounts in which knowledgeable individuals contributed to a healthy debate on the unknowable subject of the frailty of human life. Considering that five judges (two Superior Court judges and three Appeals Court judges) have read the articles as fingering Tom Scholz as the person who caused Brad's suicide, and considering that the Herald's own reporter acknowledged in a recorded radio broadcast that the articles conveyed that Scholz caused Brad "nothing but grief his whole life," the Herald's latest rhetorical gambit would seem to deserve credit for its extraordinary courage, if nothing else.

In order to pull off this trick, the Herald simply ignores much of the most significant evidence in this case. The incident with the camera posted on Meg Sullivan's ceiling receives only a passing acknowledgement, and Brad's subsequent emails and suicide notes are ignored completely, even though it is now clear (for summary judgment purposes, at least) that the event and its aftermath triggered Brad's

suicide. The Herald ignores the fact that other media picked up the articles (a sure sign they regarded them as factual). The Herald even ignores that there was substantial evidence demonstrating that Brad understood that the summer tour (which the Herald now says prompted his March suicide) was not likely to go forward.[1] But when one looks at the *entire* record, it is beyond doubt that all three articles were false and defamatory.

I. THE COURT SHOULD DISREGARD THE HERALD'S CONTENTIOUS AND INACCURATE RECITATION OF THE 'FACTS', WHICH DO NOT CITE TO THE RECORD AND DO NOT ACCURATELY REFLECT IT

The Herald's Statement of the Facts in its brief (and most of the 'facts' cited in its argument) typically receive undifferentiated string cites to multiple paragraphs of the Herald's Rule 9A(b)(5) Summary Judgment Fact Statement. That is, the Herald cites its own contentious summary of the evidence and *not* the underlying evidence. To take only one example, the main paragraph which appears on p. 6 of

[1]In clear disregard for the summary judgment standard, the Herald cobbles together testimony from friendly sources to suggest that Brad *must* have been so despondent over the possibility of a summer tour that he killed himself. Apart from the fact that such testimony *at most* creates a dispute of materials fact, it also misstates the record. Scholz informed Brad shortly before the suicide that there were only three confirmed dates and Scholz at that time had no intention of going forward with expensive staging and other required tour equipment. See A5876.

the Herald's brief receives a string cite (in footnote 3) to *50 pages* of the Herald's Fact Statement. Those 50 pages, in turn, consist of nothing but the disputed representations of counsel documented by still more string cites. Thus, to find the *underlying evidence* for the Herald's disputed assertions, the Court would need to scour the *hundreds* of pages of exhibits cited in the 50 pages.

The Herald's brief therefore violates Rule 16(e), which requires "an appropriate and accurate record reference" for each fact. Rule 16 "is not an idle technical requirement. Among other things, it prevents parties from exaggerating or distorting the facts as presented below, or from inserting into the analysis on appeal facts that are simply non-existent." City of Lynn v. Thompson, 435 Mass. 54, 57 n. 4 (2001). By citing to its lawyer-crafted fact statement rather than to the actual underlying evidence, the Herald routinely imparts 'facts' which are disputed, inaccurate, or distorted. For example, the Herald repeats Micki Delp's story about Scholz allegedly humiliating Brad mid-tour by criticizing his singing and threatening to "take the microphone and . . . throw it in the crowd." Herald Brief at 3-4. The alleged event actually occurred in 1979 at the latest, or about 27 years before the suicide. A3604 at 28. The claim that Brad confided to a friend that he could

no longer hit the high notes in the Boston songs, when traced through the 9A(b)(5) Fact Statement (A747 at ¶ 129) to the source (A3296-97), turns out to be based on Brad's gracious on-stage praise for Cosmo during the 1995 and 1997 tours, *ten years before* he killed himself. See A3297 at 184.[2] In fact, Brad was *not* dependent on Cosmo, and Boston's female bassist, Kim Dahme, was available to support Brad in the higher ranges. See A129.[3]

It would take a brief twice as long as this one to catalog the inaccuracies and distortions that result from hiding evidence under two layers of lawyer talk, but that is not Scholz's burden. Rule 56 requires the Herald to demonstrate the absence of disputed material facts, and Rule 16 requires the Herald to do so by appropriate and accurate citations.

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[2]Paragraph 129 of the Herald's 9A(b)(5) Statement cites to the deposition testimony of Brad's friend Steve Baker, but Brad never actually told Baker he was dependent on Cosmo to hit the high notes. "I don't know if he actually said it to me, but I had heard - I had heard him say just say, you know, that it was great having Fran. Actually he used to say it in the show. That's probably where I'm getting it from, when I saw them saying it in the show." A3297 at 184.

[3] The Herald also cites Baker's testimony as confirming that Brad was driven to despair by Cosmo's firing. Quite apart from the fact that Baker was never interviewed for any of the articles, he admitted that he had no personal knowledge of that subject either. See A3296 at 180 ("I - I knew that he was distraught about it. I don't know if Brad actually said to me, you know - you know. But I know that it bothered him."). See also A2397 at 182.

See Commonwealth v. Gray, 423 Mass. 293, 296-97 (1996) (argument without accurate citations disregarded). All statements which do not refer to actual evidence or to truly undisputed facts should therefore simply be disregarded.

II. THE HERALD'S ARTICLES CONVEYED THAT, AS A MATTER OF FACT, SCHOLZ CAUSED BRAD'S SUICIDE, AND AS SUCH THEY WERE NOT OPINION

Because defending the Superior Court's decision that the articles were non-actionable opinion is essentially impossible (Part A), it relies on an argument it did not raise to the Superior Court in its original summary judgment memorandum: that a public figure cannot assert a claim for defamation by implication. The cases the Herald cites are distinguishable and should not be followed (Part B).

A. The Herald Articles Do Not Fall Within The Recognized Parameters Of Opinion

The Herald's opinion argument rests upon a reading of its articles that is materially different from its position in the court below. Here, the Herald simultaneously argues that its articles were fair, balanced and objective accounts of Brad's death, but also that they also embodied "all the well-established indicia of opinion." Herald Brief at 33. The Herald specifically claims that the articles disclosed the biases of its sources while informing

its readers that the cause of the suicide was unknown. Id. at 23-24.

But the March 15th article did exactly the opposite. By reporting that "the cops **were not told** why [Brad] took his life," the Herald signaled that the cause of Brad's suicide *was* known, except that those in the know weren't talking to the police. But those same "friends" and "insiders" *were* telling the Inside Track why Brad took his life.[4] The March 16 Page One headline trumpeted that "Pal's Snub Made Delp Do It," which likewise conveyed that the Herald knew for a fact what "made Delp do it." A4205 at 194-95. The gravamen of the articles, Fee stated in her WAAF interview, was that "Scholz gave Brad grief for 20 years" and that the "feelings" from the breakup of the band were still "bitter and ugly and bad . . . twenty years later," which they weren't. A6227. The July 2 article reported (based on the March 15 and 16 articles) that former Boston members "have been at odds for decades" and "lingering bad feelings from the breakup of the original band more than twenty years ago" drove Brad "to take his own life in March." A3085. The Herald cannot reasonably depict itself as possessing such certitude in its own statements and

[4]Of course, 'friends' and 'insiders' *weren't* talking to the Herald, and its 'sources' almost uniformly denied providing any information to the Herald. See, part III.

articles, and then complain when others also read its newspaper articles as conveying determinate facts.

The Herald (like the Superior Court) also misapprehends Scholz's burden. Scholz only needs to demonstrate that the gist of the publications were false. See Shaari v. Harvard Student Agencies, Inc., 427 Mass. 129, 133-34 (1998); Dulgarian v. Stone, 420 Mass. 843, 847 (1995).[5] There seems to be no dispute between the Herald and Scholz on this one point at least: statements which are demonstrably false are not opinion. The Herald article was replete with false facts. As the evidence summarized in Scholz's opening brief demonstrated, Brad was not in the "middle of the bitter break up" of Boston, was not "pulled from both sides by divided loyalties", much less in the "middle of warring factions." Brad's suicide was not caused by a "never-ending bitterness" that was "too much for [him] to endure." Brad was not "upset over lingering

[5]The Herald unpersuasively attempts to distinguish the many cases Scholz cited for the proposition that courts routinely determine as a matter of fact the cause of a person's suicide. See Scholz Brief at 28. It is of no consequence whether any other court has ever been called upon to decide exactly what was in the mind of the suicide at the fatal moment, because Scholz does not bear that burden. If courts routinely decide whether a given circumstance caused or materially contributed to a person's suicide, and they do, it necessarily follows that Scholz's much lighter burden of excluding one cause as being a primary motivating factor cannot be the sort of inquiry a court is unable to conduct.

bad feelings" from the "breakup of the band 20 years ago." There was simply no truth to the statement that "Tom made [Brad] do the Boston stuff." Cosmo's firing did not "make [him] do it," i.e., kill himself. See Scholz Brief at 30-34. These false facts collectively conveyed that (i) conditions in the band (conditions for which Scholz was widely understood to be responsible) created a dysfunctional professional life that Delp could no longer tolerate and (ii) as a result of that mistreatment, and in particular the Cosmo firing, Brad took his life. The first describes an objective state of affairs, and is undoubtedly actionable. "It is of no consequence that [the defendant's] statements included adjectives and characteristics rather than specific acts." Thomas v. United Steelworkers Local 1938, 743 F.3d 1134, 1143 (8th Cir. 2014). See also Harman v. Heartland Food Co., 614 N.W.2d 236, 241 (Minn. Ct. App. 2000) ("Epithets or adjectives can constitute defamation if they imply a specific type of reprehensible conduct.") (internal quotation omitted).[6] If Scholz can

[6]Even opinion-like statements regarding a person's state of mind about the quality of the work environment are factual if they imply events that did not occur or describe a state of affairs that did not exist. See, e.g., Bender v. Smith Barney, Harris Upham & Co., Inc., 901 F. Supp. 863, 871 (D.N.J. 1994), aff'd, 67 F.3d 291 (3d Cir. 1995)(accusation of discrimination by retaliatory discharge was not merely "a generalized accusation of bigotry" but was capable

demonstrate that he was not a substantial cause of Brad's taking his own life, which is what the Herald articles say, then he will have demonstrated the falsity of the second proposition as well.

The Herald's brief also persistently ignores that under Massachusetts law 'opinion' is not an abstract inquiry, but rather looks to whether individuals read the article as conveying opinion. "The test is whether the challenged language can reasonably be read as stating a fact." Myers v. Boston Magazine Co., Inc., 380 Mass. 336, 340 (1980). See also King v. Globe Newspaper Co., 400 Mass. 705, 717-19 (1987) (reversing determination that an article was not susceptible to a defamatory meaning based on views of "average readers" where some readers would have believed article discredited plaintiff). Scholz presented substantial evidence that the articles (widely republished in other media) were perceived as stating actual, true facts relating to the cause of

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of disproof); Alianza Dominicana, Inc. v. Luna, 645 N.Y.S.2d 28, 29-30 (1st Dept. 1996) (cautionary statements such as "they saw" and "rumor in the streets has it" did not convert statements that organization's employees abused young women into opinion); Quigley v. Rosenthal, 43 F. Supp. 2d 1163, 1179-80 (D.Col. 1999)(imputation that defendant attempted to intimidate a neighbor deemed factual and actionable); Scott v. Cooper, 640 N.Y.S.2d 248, 249 (2d Dept. 1996)(imputation that a chief of police engaged in discriminatory behavior based on racial animus held to be not opinion because it "reasonably appear[ed] to contain assertions of objective fact").

Brad's suicide. See Scholz Brief at 26-27.[7] Like Danny Chen, the Asian-American recruit who apparently killed himself because he was racially harassed by his platoon in Afghanistan, Brad joined the list of suicides for whom the cause was believed to be known - and that cause was Scholz. See, "Army Charges 8 in Wake of Death of a Fellow G.I.," New York Times, December 22, 2011 at A1. As such, the Superior Court erred in determining that some readers could not reasonably view the Herald's articles as factual.

The cases that the Herald cites are not to the contrary. Rather, they are straightforward applications of the unexceptional principle that Massachusetts will not impose liability for defamation where the opinionative statement "discloses or implies its non-defamatory factual basis." National Ass'n of Government of Employees v. BUCI Television, Inc., 118 F. Supp. 2d 126, 130 (D. Mass. 2000) (citing Lyons v. Globe Newspaper Co., 415 Mass. 258, 265 (1993)). But readers here were not told true facts at all. The Herald's centerpiece case, Gacek v. Owens and Minor Distribs., Inc., 666 F.3d 1142, 1147 (8th Cir. 2012) is nothing more than an example of the application of the rule regarding true disclosed facts. Unlike the

[7]Reaction on the internet was particularly vitriolic, with one persistent blogger citing to the Herald's articles to pronounce that Scholz "murdered" Brad. See A6291.

factory-floor epithets in Gacek, which were heard only by a small group that shared common knowledge of the underlying facts, the false and defamatory Herald articles were all the information that many readers ever got. Thus, the Herald's articles were not protected opinion.

B. The Defamatory Sting of the Herald's Articles Was Based on False Facts, and Not the 'Juxtaposition' of True Facts

The Herald relies on two Appeals Court cases, neither of which have ever been cited or approved by this Court, to argue that Scholz cannot maintain a defamation claim based on "insinuations" created by the juxtaposition of "admittedly" true statements. See Herald Brief at 17-23, citing Mihalik v. Duprey, 11 Mass. App. Ct. 602, 605-06 (1981) and Gouthro v. Gilgun, 12 Mass. App. Ct. 591 (1981).[8] The cases concerned a newspaper article (Mihalik) and a political advertisement (Gouthro) in which candidates for public office claimed that the publication implied that they were dishonest. According to the Herald, the cases state a widely-recognized principle of not

[8]The Herald also cites Salvo v. Ottaway Newspapers, 57 Mass. App. Ct. 255 (2003), but that case did not rely on the rule stated in Mihalik. Rather, it determined under accepted principles of defamation law that the newspaper article at issue "provide[d] substantially accurate facts and substantially accurate context" about the events it described. 57 Mass. App. Ct. at 542. By contrast, the Herald here got both the facts and the context wrong.

permitting public officials to recover for individually truthful statements which collectively carry a defamatory implication. Herald Brief at 21-22, citing, inter alia, Strada v. Connecticut Newspapers, Inc., 477 A.2d 1005 (Conn. 1984); Diesen v. Hessburg, 455 N.W.2d 446 (Minn. 1990).

As a threshold matter, Mihalik and Gouthro have been widely criticized.[9] There is also substantial doubt about whether the 'holdings' in either case were anything more than dicta. See C. Thomas Dynes and Lee Levine, "Implied Libel, Defamatory Meaning and State of Mind: the Promise of New York Times Co. v. Sullivan," 78 Iowa L. Rev. 237, 305-06 (1993) (stating that Mihalik and Gouthro appear to rest upon other grounds, including "judicial determinations that the publication cannot reasonably be interpreted to imply

[9]See, R. Smolla, Law of Defamation (2d ed. 2014), § 4:19 at 4-67, n. 15 (stating that Mihalik has been "properly criticized" and "mistakenly assume[s] that those who defame by implication must be protected"); Marc Franklin and Daniel Bessel, The Plaintiff's Burden in Defamation: Awareness and Falsity, 25 Wm. & Mary L. Rev. 825, 850 (1984) (stating that the Mihalik holding represents "overreaching" insofar as "no constitutional reason exists for differentiating between those who defame explicitly and those who defame implicitly."); Nicole LaBarbera, "The Art of Insinuation: Defamation by Implication," 58 Fordham L. Rev. 677, 691, 697-98 (1990) (criticizing Mihalik as exceeding the protections afforded by the First Amendment, and arguing that whether individual statements are literally true is unimportant where "the audience is left with a false impression that may eclipse the statements' literal truth.")

the alleged defamatory meaning"). Both cases also appear to reflect a minority view, as most courts will permit an action for defamation by implication, at least outside the political arena. See, e.g., See Robert D. Sack, Sack on Defamation, § 2.4.5 (4th ed. 2013) (hereafter "Sack"); Compuware Corp. v. Moody's Investors Services, 499 F.3d 520, 528 (6th Cir. 2007); Hatfill v. New York Times Co., 416 F.3d 320, 331 (4th Cir. 2005) (recognizing defamation by implication since "it matters not how artful or disguised the modes in which the meaning is concealed if it is in fact defamatory") (internal quotation omitted).[10] Thus, it is doubtful that either case is good authority for the proposition for which the Herald cites it.

Assuming, arguendo, that Mihalik and Gouthro accurately reflect Massachusetts law, they do not apply here for three reasons. First, this was not a case of defamation by implication, but rather a case of defamation by explicit assertion. No doubt some of

[10]Some jurisdictions that allow defamation by implication require a showing that the defendant knew or intended that the defamatory inference could arise. See Biro v. Conde Nast, 883 F. Supp. 2d 441, 465-66 (S.D.N.Y. 2012) (collecting cases). The summary of the March 15 and March 16 articles contained in the Herald's July 2 article and the statements Fee made to WAAF (supra at 6) clearly demonstrate that the Herald knew that its articles conveyed that Scholz was responsible for Brad's death.

the defamatory sting of the articles required a person to know (as Micki put it) that "Tom is Boston," A7079, but that is not defamation by implication. Defamation by implication occurs where a publication "convey[s] a false and defamatory meaning by omitting or juxtaposing facts, even though all the story's individual statements considered in isolation were literally true or non-defamatory." [11] Turner v. KTRK Television, Inc., 38 S.W.3d 103, 116 (Tex. 2000). The statements cumulatively had a sting that none of them individually would have had, but the defamatory impact arises directly from what the Herald said.

Second, the defamatory impact of the Herald's stories do not derive from true statements of fact artfully juxtaposed but from false statements of fact. "Truth is available as an absolute defense only where the defamatory meaning conveyed by the words is true." Memphis Pub. v. Nichols, 569 S.W.2d 412, 420 (Tenn. 1978) (discussing and distinguishing Strada).[12] The

[11]Defamation by implication should not be confused with innuendo. See Sack, § 2.4.5 at 2-40. Innuendo is a term of art in defamation law, referring to facts outside the report that one must know in order for the report to be defamatory. Id. The Superior Court appeared to use the terms more or less interchangeably - not surprising, since the Herald did not brief defamation by implication in its opening summary judgment motion or memorandum and the court had no reason to appreciate the importance of the distinction.

[12]The omission of accurate facts (such as the fact that the 'family feud' had long since simmered down and the

Herald's articles stated (not implied) that Scholz "made [Brad] do the BOSTON stuff." See A486. The other false facts summarized at pp. 30-34 of Scholz's opening brief likewise were explicit. Even courts which have recognized the general principle that the Herald articulates have recognized that it applies only where true statements assertedly imply a false and defamatory meaning, not to situations where *false* statements imply a false and defamatory meaning. See, e.g. Schlieman v. Gannett Minn. Broad., Inc., 637 N.W.2d 297, 304 (Minn. Ct. App. 2001); Golden Bear Distrib. Sys. Of Texas, Inc. v. Chase Revel, Inc., 708 F.2d 944, 949 (5th Cir. 1983). As discussed in Scholz's opening brief and as summarized above, nearly every subsidiary fact in the articles was false, and often just invented. Hence, the Milhalik rule would not apply here.

Third, to the extent that they are good law at all, both Milhalik and Gouthro should be limited to

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fact that Brad was happy to be touring again) likewise means that this is not a case of defamation by implication. See Ramada Inns, Inc. v. Dow Jones & Co., Inc., 543 A.2d 313, 326 (Del. Super. 1987) ("true facts leading to a false inference are actionable (even where the plaintiff is a public figure), where the false inference is the result of the defendant's failure to print all the relevant and true facts."). See also Strada, 477 A.2d at 1010 (refusing to find liability for defamation by implication where there was no allegation that there were "additional material facts which, if reported, would have changed the tone of the article.").

the facts that justify and gave rise to their holdings. Courts have consistently recognized that political candidates and public officials stand on a significantly different basis than others when it comes to defamation by implication. See Stevens v. Iowa Newspapers, Inc., 728 N.W.2d 823, 827-29 (Iowa 2007) (citing and discussing cases).[13] Public officials are routinely subject to maladversions about their honesty and fidelity to the public interest, and such commentary is the accepted syntax of political discourse. See, e.g., Boski, 3 Mass. App. Ct. at 272 and cases cited. It is not taken as factual, it is rarely if ever capable of harming a person's reputation, and the individual who enters the public

[13]Indeed, in both Mihalik and Gouthro, the 'implied' defamatory content of the article was that the public officials involved had been dishonest, selfish, or otherwise had not acted in the public interest while in the political arena. The 'implication' was therefore itself the sort of opinion which was not capable of harming the plaintiff's reputation. See Mihalik at 606 (holding that the "implications" of the article at issue were "too vague and uncertain, and [had] too fragile an impact, to be the basis of a libel action by a public official"); Gouthro at 594-95 (holding that statements could not "reasonably be understood to be defamatory" because they were "too vague to be cognizable as the subject of a defamation action.") (internal quotation omitted). As such, both cases were examples of the unremarkable principle that imputations of base motives to public officials are not defamatory because they are neither capable of harming the public official's reputation nor will they be taken as factual given the context of statement. See Boski v. Kochanowski, 3 Mass. App. Ct. at 269, 272 (1975); King, 400 Mass. at 709-710.

arena knows or should know that it is "part of the hyperbole and rhetoric which normally attend the clamor for the voter's attention." Gouthro at 594-95. The defamatory statements here concerned not matters that were public knowledge, known and available to anyone who cared to access it (such as comments about Boston's music, which anyone can hear for themselves). The remarks instead concerned the business of running a band and the ostensible results of behind-the-scenes mistreatment that Scholz doled out to Brad. Such statements could be taken as defamatory, were in fact taken by the public as defamatory, and therefore are far outside the rationale for the underlying policies upon which Mihalik and Gouthro rest.

Finally, the Herald's attempts to wrap itself in the mantle of the Constitution are singularly unpersuasive. The Herald "did not merely comment on a public controversy, but added false facts to a public controversy," an endeavor the First Amendment does not protect. Condit v. Dunne, 317 F. Supp. 2d 344, 372 (S.D.N.Y. 2004). Thus, the Superior Court erred in entering summary judgment in the Herald's favor, and its order must be reversed.

III. SCHOLZ HAD SUFFICIENT EVIDENCE TO RAISE A TRIABLE ISSUE ON ACTUAL MALICE

The lynchpin of the Herald's actual malice argument is that it accurately quoted Micki and its

other sources. But as Scholz's opening brief pointed out, 'truth' cannot be established by accuracy: quoting someone else's (false and defamatory) statements is just as defamatory as making it up. "[T]he republisher of a defamatory statement 'is subject to liability as if he had originally published it.'" Appleby v. Daily Hampshire Gazette, 395 Mass. 32, 36 (1985), quoting Restatement (Second) of Torts, § 578 (1977). See Scholz Brief at 47. Thus, the accuracy of the quotes would not insulate the Herald from liability.

More importantly, the Herald's stories did not accurately quote its 'sources.' Four of the six alleged 'sources' for the March 15 article (Ian Barrett, Jeff Myerow, Gail Parenteau, and Connie Goudreau) have just vanished from the Herald's brief, an implicit concession that Fee's sworn interrogatory responses cannot be credited. See A6403-05,6411, 6413, 6415-16. As to the other two 'sources', Boch denied providing *any* information to the Herald in connection with the article.[14] Geary did speak with

[14]Notably, Boch (like Barrett and Myerow, two other 'sources' the Herald didn't actually talk to) concededly had no first knowledge of *anything*: Boch was the 'source' for speculative inferences about what Hashian and Goudreau, the real 'friends' and 'insiders,' thought about the matter. See A3435 at 164; A3437 at 208 (agreeing that he "didn't provide any information to the Herald in connection with this article"). The Herald therefore necessarily had no

Fee, but denied providing any information about the suicide or the cause of it and denied knowing or believing anything about what caused it. See A3985 at 86-88. The conclusion inescapably follows that there *was* no source for the information beyond the Herald's own suppositions.

The evidence of fabrication of the March 16 articles is even stronger. The Herald repeatedly quotes Judge McIntyre's erroneous statement that Micki Delp's 2008 and 2011 testimony was consistent, but it never once quotes or cites the underlying testimony. The Herald also refuses to even acknowledge that the Appeals Court found that Micki's 2008 deposition testimony conveys that the Herald materially misquoted her. See Scholz v. Delp, 83 Mass. App. Ct. 590, 594-95 (2013). In fact, Micki's sworn deposition testimony appearing at A3711-15 and A3719-20 directly contradicts the 2011 testimony that the Herald bought and paid for. Her actions immediately following the

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idea *when* Goudreau and Hashian had last spoken with Brad, nor how recently Boch had spoken to his 'sources'. That comes very close to defining reckless disregard for the truth. See LeBeau v. Town of Spencer, 167 F. Supp.2d 449, 456 (D. Mass. 2001) (finding that publication of "hearsay and uncorroborated rumors" was evidence of actual malice); King, 400 Mass. at 721-22 (reckless for reporter to rely on hearsay, especially where source had no personal knowledge); Tosti v. Ayik, 339 Mass. 482, 493 (1985) (actual malice found where defendant "based his report] on suspicions and not facts.").

publication of the article - calling friends and relatives to say she was misquoted - also contradicts her 2011 testimony - and, predictably, is just ignored by the Herald. See Scholz Brief at 43.

Accordingly, this was not, as the Herald would have it, "an erroneous interpretation of data" or some similar inaccuracy. Herald Brief at 48. The facts closely mirror those in Murphy v. Boston Herald, 449 Mass. 442 (2007), a case that the Herald studiously avoids discussing. Here, as in Murphy, the Herald's sources have broadly denied providing information to the reporter. Id. at 53-54.[15] As in Murphy, the reports were wildly erroneous, as witness after witness agreed that the family 'feud', the 'dysfunctional' professional life, the supposed mistreatment by Scholz, and all the other lurid details were simply wrong. See Scholz Brief at 30-34. Because the jury could have found that the reporter had no source for the article, "[t]he conclusion follows, inescapably, that [the reporter] knew that he had no percipient source for his report." 449 Mass.

[15]Significantly, one witness in Murphy *did* step forward to vouch for the information in the article, but the Murphy court determined that such testimony could have been disregarded due to the source's bias. Id. at 55. The same principle necessarily has greater force when a witness tries to recant her testimony under oath after cutting a beneficial deal with the party benefitting from the recanted testimony, as Micki does here.

at 59. Thus, Scholz's evidence of fabrication, without more, raises a triable issue on actual malice.

Even as to Micki's statements that the Herald accurately quoted, Scholz has a case for reckless disregard for the truth. The Herald had received specific credible warnings not merely that Micki had some vague, generalized bias, but had expressed in just so many words an intent to "pin" Brad's suicide on Scholz. A4490 at 531. Parenteau further warned the Inside Track not to trust what Delp said unless they saw what was in the notes. A4490 at 530. Nevertheless, Fee specifically *avoided* asking Pam Sullivan or Micki what was in the suicide notes or to verify the information in the articles, even though she spoke to both of them on the phone. A3907 at 326-27. If asked, Pam would have told Fee that the information in the articles was false. See Scholz Brief at 50-51. "Reckless conduct may be evidenced in part by failing to investigate thoroughly and verify the facts . . . particularly where the material is peculiarly harmful or damaging to the plaintiff's reputation or good name." Babb v. Minder, 806 F.2d 749, 755 (7th Cir. 1986) (citing cases). Thus, even as to the quotes Micki acknowledged, a triable case existed on actual malice.

Fee's and Raposa's destruction of their notes was also sufficiently material to justify a spoliation

inference. The Herald reporters *immediately* learned that an issue existed about the veracity of their reports.[16] See Murphy at 61. The notes would have shown whether the reporters talked to Boch, Barrett, or the other claimed sources, and would presumably have dispositively answered the question of whether 2008 Micki or 2011 Micki was telling the truth at her deposition. Thus, it must be assumed from the destruction of the notes that their contents would have been unfavorable to the Herald.

Finally, the Herald refuses to tell the Court why it has, *to this day*, not told its readers the truth about why Brad committed suicide, about the camera Brad taped to Meg's bedroom ceiling or about Brad's final anguished e-mails or Meg's tearful deposition testimony about his last day. See Herald Brief at 51-52. The strong majority view holds that it is at least *a permissible* inference from the Herald's subsequent refusal to tell its readers the truth that the Herald does not care what the truth is and never did. See, e.g., Holbrook v. Casazza, 349, 528 A.2d

[16]The Herald's own guidelines require a reporter to maintain copies of her notes whenever the accuracy of a story is challenged. See A7193 at 83 ("if a complaint about a material error about a story has been received and is not otherwise resolved, the journalist is instructed to maintain the relevant materials as they existed at the time the complaint was received.").

774, 780 (Conn. 1987), *cert. denied*, 484 U.S. 1006 (1988); Mahnke v. Nw. Publ'ns, Inc., 160 N.W.2d 1, 11-12 (Minn. 1968). Restatement (Second) of Torts, § 580A, comment d (1977). Cf. Murphy at 65 (unwillingness by reporter to reappraise his story when contradicted by other publications "suggests, decisively, that [the reporter] possessed either a brazen disregard for the actual truth or a deliberate intent to give credence to a controversial story he knew (at the time) to be false."). Thus, on summary judgment adverse inferences must be drawn about the Herald's subjective good faith.

IV. EXPERT TESTIMONY WAS NOT REQUIRED TO CREATE DISPUTED ISSUES OF FACT ABOUT WHETHER THE ARTICLES CAUSED SCHOLZ'S PHYSICAL SYMPTOMS

The Herald's only argument for affirming the dismissal of Scholz's intentional infliction of emotional distress ("IIED") claim is Scholz's failure to introduce expert testimony to the effect that his emotional distress caused the resurgence in his physical symptoms. Those stress-related symptoms included anxiety, fatigue, insomnia, gastrointestinal issues, and inability to concentrate. See e.g., A5538 ("severe fatigue"); A5707 ("fatigue . . . unable to sleep"); A5538 ("digestive disturbance"); A5704 ("continues to have digestive disturbance . . . no evidence of other infection or disease process");

A5720 ("still wiped out over Boston Herald stress issues," blood pressure "has been high in the past few weeks"); A4323 at 334-35 (Ativan prescribed for anxiety for first time following Herald articles).

But this was not a case where proof of causation relied on exotic medical theories that a jury could not understand without expert assistance. See Pitts v. Wingate, 82 Mass. App. Ct. 285, 289 (2012) ("where a determination of causation lies within 'general human knowledge and experience,' expert testimony is not required."), quoting from Lovely's Case, 336 Mass. 512, 516 (1957). Scholz's physical problems were precisely what one would expect from the stress and emotional disturbance that the articles caused. See Cady v. Marcella, 49 Mass. App. Ct. 334, 341 (2000) (jury could reasonably find, without medical expert, that plaintiffs' emotional distress could have caused "headaches, upset stomachs, and inability to concentrate at work"). Thus, no expert was required.

V. THE SUPERIOR COURT'S AWARD OF OVER $130,000 IN DEPOSITION COSTS WAS EXCESSIVE, AND SHOULD BE REVERSED

The Herald does not cite to a single appellate court decision supporting its suggested legal standard for taxing costs. In Federico v. Ford Motor Co., 67 Mass. App. Ct. 454, 463 n. 10 (2006), the Court acknowledged that the trial judge "did not award all

the costs that were requested." Therefore, contrary to the Herald's assertion, not every deposition taken during the course of a case is reasonably necessary. Rather, the Court should assess the extent to which the witness' testimony was necessary to the proceedings which resulted in the entry of judgment - a process not undertaken by the lower court.[17] Thus, the award of costs should be reversed and remanded for consideration under the correct legal standard.

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.

[17]Little of the summary judgment record finds its way into the Herald's brief, and even a casual perusal of the record will show that it is littered with irrelevant, immaterial and cumulative information that would never be made part of the evidentiary record at trial (Frederico went to trial). This is another reason why the widely recognized legal standard for the taxation of costs in the federal courts, which our rules were modeled after, is whether the deposition testimony cited was relevant to the issues presented to the court at summary judgment and whether the testimony cited assisted the court in forming the basis for its decision.

Respectfully submitted,
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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. 18 (appendix to briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).

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