No. 15-1103

IN THE

Supreme Court of the United States

DONALD THOMAS SCHOLZ, ET AL.,

Petitioners,

v.

MICKI DELP, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF FOR MICKI DELP IN OPPOSITION

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Introduction

The Supreme Judicial Court of Massachusetts never decided Petitioners' claimed "Question Presented." The opinion itself belies Petitioners' contention that the Court adopted a "categorical" rule exempting statements about a person's motive in committing suicide from defamation claims in supposed contravention of this Court's decision in *Milkovich v. Lorain Journal Co.,* 497 U.S. 1 (1990). Quite to the contrary, in referencing *Milkovich,* the Court clearly stated, "[w]e recognize that there is no 'wholesale defamation exemption for anything that might be labeled 'opinion.'" *Scholz v. Delp*, 473 Mass. 242, 252, 41 N.E.3d 38 (2015), [1] quoting *Milkovich*, *supra* at 18. *See infra*, at I.

Moreover, the *Scholz* opinion reveals that the case was disposed of largely on independent and adequate state law grounds. The opinion rests predominantly on the Supreme Judicial Court's own precedents governing the common law tort of defamation, which adopted the RESTATEMENT (SECOND) OF TORTS § 566 (1977). In particular, the Court repeatedly cited to *Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 612 N.E.2d 1158 (1993), in which it had made clear, soon after *Milkovich* was decided, that "the rule protecting expressions of opinion based on disclosed or assumed nondefamatory facts is by now an integral part of our common law" and supported by Article 16 of the Declaration of Rights in the Massachusetts Constitution. *Lyons*, 415 Mass. at 267. In *Lyons*, the Court also concluded

[1] The opinion of the Reporter of Decisions is included as an Addendum, and this Opposition cites directly to that official reported version.

that those principles of state law and its decision applying them were consistent with *Milkovich. Id.* at 266-67. In addition, it announced that it would reach the same result under state law "even if there existed no Federal constitutional support for the principles which we applied." *Id.* at 269-70. *See infra*, at II.

Finally, the claimed conflict in decisions on which Petitioners rely to justify review by this Court simply does not exist. Nothing in the decisions of federal and state courts since *Milkovich* suggest animosity toward or evasion of this Court's interpretation of the First Amendment. *See infra*, at III.

Proceedings Below

These consolidated cases from the Supreme Judicial Court of Massachusetts involve fact-bound defamation claims and were decided on the basis of appellate records totaling over 9,000 pages, with extensive briefing and argument on multiple issues other than Petitioners' claimed "Question Presented." The cases began when Petitioners filed an action for defamation against Respondent Micki Delp ("Micki")[2] based on statements she had made to the Boston Herald six days after the suicide of her friend and former husband, Brad Delp ("Brad"). 473 Mass. at 243. In ordering summary judgment for Micki in Massachusetts' general trial court, the Superior Court, the judge ruled as a matter of law that Micki's statements were not defamatory as to Scholz or even "of and concerning" him. Pet. App.

[2] The SJC referred to Micki Delp as "Micki" and Brad Delp as "Brad," since they share the same last name, *Scholz*, 473 Mass. at 243 n.3, and this Opposition follows the same practice.

45a-49a. In addition, the Superior Court judge ruled that since Scholz was a public figure who would be required to prove that Micki had knowingly lied or entertained serious doubts about the truth of her statements, summary judgment was further warranted because the summary judgment record did not raise a material dispute on that issue. *Id.* at 49a-51a. Because he had granted summary judgment on these three other grounds, the Superior Court judge expressly did not address whether Micki's statements were fact or opinion. *Id.* at 51a. A panel of the intermediate appellate court in Massachusetts, the Appeals Court, reversed the grant of summary judgment. *Scholz v. Delp*, 83 Mass. App. Ct. 590, 988 N.E.2d 4 (2013). Pursuant to Rule 27.1 of the Massachusetts Rules of Appellate Procedure, the Supreme Judicial Court granted Micki's application for further appellate review. *Scholz v. Delp*, 466 Mass. 1103, 993 N.E.2d 349 (2013).

In the meantime, Petitioners' defamation action against the Boston Herald was disposed of on summary judgment by a different Superior Court judge on the grounds that "plaintiff has no reasonable expectation of proving the statements were false, and they constitute non-actionable opinion." Pet. App. 79a. Petitioners appealed and the Supreme Judicial Court granted direct appellate review under Rule 11 of the Massachusetts Rules of Appellate Procedure. Having taken both Micki's case and the Herald's case onto its docket, and received briefing in both, the Court paired the cases for argument and issued a single opinion upholding the Superior Court's grant of summary judgment in

each case.[3] *Scholz v. Delp*, 473 Mass. 242, 41 N.E. 3d 38 (2015). That decision is now the subject of this petition for a writ of certiorari.

Supreme Judicial Court Decision

Applying its own common law of defamation, the Supreme Judicial Court affirmed the Superior Court's order allowing Micki's motion for summary judgment because "a reasonable reader of the Herald articles would conclude that Micki's statements either asserted nondefamatory facts or were opinions that did not imply undisclosed defamatory facts." *Scholz*, 473 Mass. at 255. The undisputed facts on which the Court relied were summarized in the opinion itself, *id.* at 243-48, and are set forth here in bullet points:

- Micki and Brad were married for sixteen years and divorced in 1996 due to Brad's mental health issues. They had two children and remained friends.
- The band Boston was founded in 1975, after Scholz and Brad obtained a recording contract, and Scholz hired band members

[3] Massachusetts appellate practice differs from federal practice in that when the Supreme Judicial Court grants an application for further appellate review without limitation (as was done here, 466 Mass. 1103 (2013)), the effect is to vitiate the decision of the Appeals Court and transfer the entire case to the Supreme Judicial Court for review of the decision of the trial court *de novo*, not for review of the decision of the Appeals Court. This case illustrates the practice, because the Court discussed and reviewed the Superior Court's decision and its rescript was directed solely to the Superior Court. *Scholz*, 473 Mass. at 256. The Supreme Judicial Court's decision is the only appellate decision that issued to the trial court. *See* Armstrong and Carey, *Massachusetts Appellate Practice*, sec.7.30[2], LexisNexis Practice Guide (2015), pp. 7-20 to 7-21.

Barry Goudreau, Sib Hashian, and Fran Sheehan to join the group. Approximately thirty years before Brad's suicide, there was a falling out between Scholz and the three, who left the band.

- Scholz and Brad continued to tour with different band members under the name "Boston." Fran Cosmo joined the band as a backup singer for Brad, and as Brad got older and had more difficulty reaching the high notes for which Boston was known, Brad was dependent on Cosmo's voice as a backup to his.
- Brad maintained his friendship with the former members of the group, who discontinued contact with Scholz, and played with the former band members when he was able to.
- Brad suffered from stage fright before performances with Boston and with another group with which he had played in the early 1990s. He had a long history of depression and anxiety.
- Sometime at the end of 2006, Scholz told Brad that Boston would be performing on tour in the summer of 2007, and that rehearsals for the tour would begin in March 2007. On February 28, Scholz told Brad that the initial summer performances had been confirmed. While the plan had been that Cosmo would join the tour, that invitation was rescinded. On March 1, Scholz sent an electronic message to Brad advising him that the summer tour was not confirmed.

- Brad committed suicide on March 9, 2007. He left several suicide notes, including one addressed to Micki and one to his two adult children.
- On March 15, Micki – after initially declining – spoke to two Boston Herald reporters who wrote the newspaper's entertainment news column.
- In Micki's statements published by the Boston Herald the next day, Micki did not mention Scholz, much less blame him for causing Brad's suicide. Rather, Micki stated the following to the reporters either as quoted or as characterized by the reporters in the article:[4]
    - Brad was upset over the lingering bad feelings from the ugly breakup of the band Boston over 20 years ago.
    - Cosmo had been "disinvited" from the planned summer tour, "which upset Brad."
    - "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.

[4] The quoted material reflects Micki's actual words, while the unquoted material reflects the reporters' characterization of Micki's statements. The Supreme Judicial Court assumed that Micki made all of these statements. *See Scholz*, 473 Mass. at 255-56.

Rather than hurt anyone else, he would hurt himself. That's just the kind of guy he was."

- "Barry and Sib are family and the things that were said against them hurt. Boston to Brad was a job, and he did what he was told to do. But it got to the point where he just couldn't do it anymore."
- "No one can possibly understand the pressures he was under."
- Brad 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.

Applying to these facts the multifaceted factors that its cases required, the Supreme Judicial Court determined that certain of Micki's statements could be read as stating that "in Micki's opinion, pressure from the band caused Brad to commit suicide." *Scholz*, 473 Mass. at 255. Specifically, the SJC concluded that "the statements concerning Brad's motivations in deciding to take his own life were opinions, given the context and the speculative nature of the comments on the multiple proffered reasons for Brad's suicide." *Id.* at 256. Based on its review of the record, the SJC determined that "the facts upon which the opinions were based were 'apparent and disclosed,'" quoting *National Ass'n of Gov't Employees, Inc. v. Central Broadcasting Corp.*, 379 Mass. 220, 226, 396 N.E.2d 996 (1979), *cert. denied*, 446 U.S. 935 (1980), and were not defamatory as to Scholz. *Id.* at 255. The SJC also

concluded that Micki's opinions did not imply any undisclosed defamatory facts. *Id.* at 256. The SJC, therefore, held that Micki's statements to the Boston Herald are not actionable as defamation and affirmed summary judgment in her favor. *Id.*

REASONS FOR DENYING PETITION

I. The Supreme Judicial Court Did Not Create Any Categorical Presumption that Statements about a Person's Motive in Committing Suicide Are Matters of Opinion that Cannot Be the Basis of a Defamation Claim.

This case does not present the question claimed by Petitioners, namely "[w]hether the First Amendment creates a categorical presumption that statements about a person's motive in committing suicide are matters of 'opinion' rather than 'fact' and thus cannot be the basis of a defamation claim." Pet. at i. The Court's opinion did not pose or decide that issue at all. In contending that the Court below created a categorical privilege for opinions in defamation actions that was rejected in *Milkovich,* Petitioners advance a tortured reading of the Supreme Judicial Court's opinion that fundamentally mischaracterizes the decision below.

The opinion stated:

> We recognize that there is no "wholesale defamation exemption for anything that might be labeled 'opinion.'" *Milkovich v. Lorain Journal Co., supra* at 18, 110 S.Ct. 2695. Even a statement that is "cast in the form of an opinion may imply the existence of defamatory facts on which the opinion purports to be based, and thus may be

> actionable." *King v. Globe Newspaper Co.*, 400 Mass. 705, 713, 512 N.E.2d 241 (1987). By contrast, an opinion "based on disclosed or assumed nondefamatory facts is not itself sufficient for an action of defamation, no matter how unjustified or unreasonable the opinion may be or how derogatory it is." *Dulgarian v. Stone*, 420 Mass. 843, 850, 652 N.E.2d 603 (1995), quoting *Lyons v. Globe Newspaper Co.*, *supra* at 262, 617 N.E.2d 1158.

Scholz, 473 Mass. at 252-53.

In discussing the applicable legal standards, the Court noted that "it is much easier to recognize the significance of the distinction between statements of opinion and statements of fact than it is to make the distinction in a particular case." *Scholz*, 473 Mass. at 250 (internal citations omitted). It recognized, in addressing whether Micki's statements constituted opinions, that "a court must 'examine the statement in its totality in the context in which it was uttered or published,' and 'must consider all the words used, not merely a particular phrase or sentence." *Scholz*, 473 Mass. at 250, quoting *Cole v. Westinghouse Broad. Co.*, 386 Mass. 303, 309, 435 N.E.2d 1021 (1982), *cert. denied*, 459 U.S. 1037 (1982). Among the factors identified were "'the specific language used'; 'whether the statement is verifiable,' 'the general context of the statement'; and 'the broader context in which the statement appeared.'" *Scholz*, 473 Mass. at 250-51, referring to *Milkovich*, 497 U.S. at 9, quoting *Scott v. News-Herald*, 25 Ohio St.3d 243, 250, 496 N.E.2d 699 (1986); *see also Lyons*, 415 Mass. at 263 (identifying

factors for distinguishing opinion from fact under several state cases).

The Court applied those factors to the summary judgment record and determined that several of Micki's statements could reasonably be read to state "that in Micki's opinion, pressure from the band caused Brad to commit suicide." *Scholz*, 473 Mass. at 255. It looked at the "context," "the speculative nature of the comments," and "the multiple proffered reasons" for the suicide. *Id.* at 256. It also stated that whether Brad's motive for suicide included any of the various reasons propounded by Micki "is no longer capable of verification" and, therefore, not factual.[5] *Id.* at 255-56. The Court examined, again based on the record, whether the opinions were based on defamatory facts, expressed or implied. *Scholz*, 473 Mass. at 255-56. It was only after it determined that the opinions were based on disclosed nondefamatory facts and did not imply undisclosed defamatory facts that the Court held that Micki's statements were not actionable. *Id.*

The decision was therefore entirely consistent with *Milkovich*, which reaffirmed prior holdings that statements that "cannot reasonably [be] interpreted as stating actual facts about an individual" are protected by the First Amendment, *Milkovich*, 497 U.S. at 20 (internal quotation omitted), and reversed summary judgment, because the statements at issue

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[5] Massachusetts cases distinguish motive and intent of a defendant in a criminal case, which are normally considered a factual matter, from statements about the motive and intent of a public official (and, presumably, a public figure as here), which are considered statements of opinion in libel actions. *King v. Globe Newspaper Co.*, 400 Mass. 705, 710, 512 N.E.2d 241 (1987), *cert. denied*, 485 U.S. 940 and 485 U.S. 962 (1988).

implied defamatory facts. In fact, rather than contradicting *Milkovich*, the Supreme Judicial Court embraced the very language in *Milkovich* that established the proposition that there is no separate categorical exemption for statements labeled "opinion," stating: "We recognize that there is no 'wholesale defamation exemption for anything that might be labeled 'opinion.'" *Scholz*, 473 Mass. at 252, quoting *Milkovich*, *supra* at 18.

Yet Petitioners profess to find in the *Scholz* opinion a "categorical presumption" that opinions about the cause of suicide can never be actionable, created in flat contravention of *Milkovich*. Disregarding the pages of discussion of the applicable legal principles and standards, all patently consistent with *Milkovich*, and ignoring the extensive analysis of the detailed facts of this particular case, *id.* at 249-54, 255-56, Petitioners grasp at a single introductory observation in the opinion and assert that it constitutes a "special rule" that "created the new First Amendment privilege that *Milkovich* abjured." Pet. 3. *See also* Pet. 4, 15, 16, 27 n.7, and 30. The observation was, "We begin with the observation that, ordinarily, ascertaining the reason or reasons a person has committed suicide would require speculation; although a view might be expressed as to the cause, rarely will it be the case that even those who were close to the individual will know what he or she was thinking and feeling when that final decision was made. While we can imagine rare circumstances in which the motivations for a suicide would be manifestly clear and unambiguous, this is not such a case." *Scholz*, 473 Mass. at 251.

The assertion that these sentences—ripped out of their context in the midst of an opinion that

carefully articulates established legal principles and standards, and that proceeds meticulously to apply them to the undisputed facts in the record—were intended to create a new exemption from defamation in contravention of *Milkovich* is an egregious misstatement of the decision below. Were there any merit to Petitioners' contention that the opinion created a "categorical presumption" that statements about a person's motive in committing suicide are nonactionable opinions, the vast bulk of the Court's explanation of the reasons for the decision would have been unnecessary. Fairly read as a whole, the opinion reveals that the Court applied well-established law, consistent with *Milkovich*, in concluding that Micki's specific statements about Brad's suicide were nonactionable.

Thus, contrary to Petitioners' contention, the Supreme Judicial Court did not establish a categorical exemption from defamation for statements about a decedent's motive for suicide in supposed contradiction of *Milkovich v. Lorain Journal Co.,* 497 U.S. 1 (1990). Rather, it carefully reviewed the entire record under traditional standards and concluded that Micki's statements of fact were not defamatory as to Scholz and her opinions regarding the reasons her friend and former husband committed suicide were nonactionable opinions based on disclosed facts and did not imply undisclosed defamatory facts. Its decision was entirely consistent with this Court's ruling in *Milkovich* (as well as with well-established Massachusetts law). Since Petitioners' "Question Presented" was not actually decided in the Court below, certiorari should be denied. E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, *Supreme Court Practice* (10th ed. 2013) at 508.

II. The Supreme Judicial Court's Decision Is Supported by an Independent and Adequate State Ground.

The *Scholz* opinion repeatedly cited to state law defamation precedents; the ruling that Micki's statements were not actionable rested on independent and adequate state law grounds. A long line of Massachusetts cases on defamatory opinions makes clear that the Supreme Judicial Court would have rendered the same decision even in the absence of federal constitutional support for the principles that it applied.

In analyzing Petitioners' claims, the Court applied the holding in *Lyons v. Globe Newspaper*, 415 Mass. 258, 612 N.E.2d 1158 (1993).[6] In *Lyons*, decided three years after *Milkovich*, the Court recanvassed its decisions on defamatory opinions. Citing to *National Ass'n of Gov't Employees, Inc. v. Central Broadcasting Corp.,* 379 Mass. 220, 227, 396 N.E.2d 996 (1979), *cert. denied*, 446 U.S. 935 (1980), the Court noted that "we adopted the principles governing expressions of opinion set forth in § 566 of Restatement (Second) of Torts (1977)" and "held that '[a] defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.'" In that case, the Court explained, "'[a] simple expression of opinion based on disclosed or assumed nondefamatory facts is not

[6] Although much of the legal analysis appeared in the section of the opinion addressing Petitioners' claims against the Boston Herald, the Court made clear that the same reasons applied to Petitioners' claims against Micki. *Scholz*, 473 Mass. at 255.

itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how derogatory it is.'" *Lyons*, 415 Mass. at 263-64, citing *National Ass'n of Gov't Employees, Inc.*, 379 Mass. at 227-28, and RESTATEMENT (SECOND) OF TORTS § 566 comment c., second par. (1977). The Court concluded in *Lyons*, as it did in *Scholz*, that "under established principles of Massachusetts law the challenged statements were not actionable." 415 Mass. at 266.

Lyons, which was repeatedly cited in the *Scholz* opinion, has particular bearing on this case because it contains a comprehensive discussion of the Supreme Judicial Court's view of the relationship between Massachusetts defamation law and the First Amendment. In *Lyons*, the Court examined "the plaintiffs' argument that the decision of the Supreme Court of the United States in *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), compels us to reach a contrary result." 258 Mass. at 266. Concluding that *Milkovich* was entirely consistent with state law, the Court held that "nothing in *Milkovich* requires us to alter the principles of law which we have described today or their application to the facts of [*Lyons*]." *Id.* at 266-67.

The Supreme Judicial Court stated further that the rule protecting expressions of opinion based on disclosed or assumed nondefamatory facts "is by now an integral part of our common law." It noted that while the "constitutional roots" of that rule can be traced to the First Amendment, "such constitutional underpinning may be found also in art. 16 of our Declaration of Rights." 415 Mass. at 267. It then announced that these state law

principles would continue to control and endure regardless of federal constitutional doctrine:

> In the seminal case adopting the common law rule described, we stated that although "it appears that our result is compelled by doctrines deriving ultimately from the First Amendment as interpreted by the Supreme Court ... were it not constitutionally required, we would reach the same result, believing that the action is plainly without merit and the prospect of forcing the defendant to trial in such a case would put an unjustified and serious damper on freedom of expression" (footnote omitted). *National Ass'n of Gov't Employees, supra,* 379 Mass. at 233, 396 N.E.2d 996. **Today as well, the independent protections of freedom of speech which are found in our common law and in art. 16 would lead us to reach the same result even if there existed no Federal constitutional support for the principles which we applied**.

Lyons, 415 Mass. at 267-68 (emphasis added). *Lyons* is the Supreme Judicial Court's definitive, unambiguous declaration that it resolves these opinion defamation cases under state law and would reach the same result irrespective of federal law.[7]

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[7] Other state courts of last resort have similarly concluded that statements of opinion are protected under their states' constitutions and common law, and are not restricted by First Amendment precedent. *See West v. Thomson*

Petitioners' suggestion that the *Scholz* decision rested on and was dictated by the First Amendment is simply incorrect. The Petitioners omit any mention of *Lyons*, and the cases cited by Petitioners are not merely "First Amendment cases" as Petitioners characterize them.[8] For example, in *Pritsker v. Brudnoy*, 389 Mass. 776, 778-82, 452 N.E.2d 227 (1983), while the Court acknowledged the "common ground" that the First Amendment protects certain expressions of opinion, it ordered summary judgment for defendants by applying the RESTATEMENT (SECOND) OF TORTS § 566 and concluding that the challenged opinions did not imply the existence of undisclosed defamatory facts. *See also Cole*, 386 Mass. at 312-13 (applying Section 566 and concluding that statements were not actionable because they were opinions that did not imply undisclosed defamatory facts). While the *Scholtz* opinion concededly cited to a statement in *National Ass'n of Gov't Employees, Inc. v. Central*

Newspapers, 872 P.2d 999, 1007, 1012-18 (Utah 1994) (recognizing that the First Amendment provides a minimum level of protection of free expression that state law must respect, and explicitly providing greater protection by concluding that the Utah Constitution exempts expressions of opinion from defamation claims in that state); *Immuno AG v. Moor-Jankowski*, 77 N.Y. 2d 235, 248-52, 567 N.E.2d 1270, *cert. denied*, 500 U.S. 954 (1991) (noting free speech protections under New York Constitution are often broader than the minimum required by the federal Constitution, and explicitly resolving case under operative state standard "for separating actionable fact from protected opinion").

[8] *See* Pet. at 13 n.4 ("The other cases the court cited were also First Amendment cases") (citing *Pritsker v. Brudnoy*, 452 N.E. 2d 227, 228-31 (Mass. 1983); *Cole v. Westinghouse Broadcasting Co., Inc.*, 435 N.E.2d 1021 (Mass. 1982); and *Levinksy's v. Walmart Stores, Inc.*, 127 F.3d 122 (1st Cir. 1997))).

Broadcasting Corp., 379 Mass. at 227, that quoted from *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), Petitioners fail to mention that the Court in that case also quoted from the RESTATEMENT (SECOND) ON TORTS § 566, and explicitly concluded that it would reach the same decision even if the First Amendment did not compel the result. 379 Mass. at 233.

Accordingly, the *Scholz* decision is obviously distinguishable from the cases cited by Petitioners to support this Court's jurisdiction. Pet. 14 n.4. In *Michigan v. Long*, the lower court "relied *exclusively* on its understanding of … federal cases," did not cite a "single state case … to support the state court's holding," and "declared that the search … was unconstitutional because "[the lower court] erroneously applied the principles of *Terry v. Ohio.*" 463 U.S. 1032, 1043-44 (1983) (internal citations omitted) (emphasis in original). Similarly, in *Milkovich*, the lower court relied on another state court decision which, although citing the state constitution, "relied heavily on federal decisions interpreting the scope of First Amendment protection accorded defamation defendants." 497 U.S. at 10 n.5.

The independence and adequacy of the state law grounds in *Scholz* are clear from the rationale of the opinion, from the cases cited in the opinion, and from a uniform line of decisions before *Milkovich* and reaffirmed after *Milkovich* applying principles from the common law of defamation and Article 16 of the Declaration of Rights of the Massachusetts Constitution in precisely the same manner as in this case. This Court holds "no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension."

Smith v. Phillips, 455 U.S. 209, 221 (1982). The same unbroken line of Massachusetts decisions establishes that the Supreme Judicial Court "would reach the same result even if there existed no Federal constitutional support for the principles which we applied." *Lyons*, 415 Mass. at 268-69. In these circumstances, the petition for a writ of certiorari should be denied. *See Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) ("[I]f the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an [impermissible] advisory opinion.").

III. There Is No "Deep and Abiding Conflict among Courts" Requiring Resolution by this Court.

Petitioners claim that the *Scholz* decision conflicts with the decisions of other federal and state courts on an important federal question,[9] so as to bring their petition within Supreme Court Rule 10(b) (in exercising its discretion whether to grant a petition for a writ of certiorari, the Court considers whether "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals"). Their effort is puzzling. The cases they cite as illustrating the conflict illustrate precisely the opposite.

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[9] Petitioners frame this federal question as "[w]hether the First Amendment creates a categorical presumption that statements about a person's motive in committing suicide are matters of 'opinion' rather than 'fact' and thus cannot be the basis of a defamation claim." Pet. at i. As discussed *supra*, Micki disputes this characterization of the *Scholz* opinion.

Gacek v. Owens & Minor Distrib. Inc., 666 F.3d 1142 (8th Cir. 2012), is the only case cited by Petitioners that analyzed the issue addressed by the SJC below, and its ruling is entirely consistent with *Scholz.* In *Gacek*, defendants were alleged to have explicitly accused plaintiff of causing his co-worker's suicide. Applying Minnesota law, not federal law, the court affirmed summary judgment for defendants on the defamation claim, because these statements did not "express 'objectively verifiable facts' about [the co-worker's] decision process." *Id.* at 1147. The court concluded that "Minnesota follows the principle that 'anyone is entitled to speculate on a person's motives from the known facts of his behavior.'" *Id.* at 1147-48, quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993). Accordingly, *Gacek* does not stand for the proposition that the First Amendment categorically exempts these types of statements from defamation claims.

Yohe v. Nugent, 321 F.3d 35 (1st Cir. 2003), also cited by Petitioners, does not create a categorical exemption for opinions regarding suicide. There, the First Circuit relied largely on Massachusetts defamation law precedents in affirming summary judgment as to defendant police chief's statement that he believed plaintiff was suicidal. *Yohe*, 321 F.3d at 41-42, citing *Lyons v. Globe Newspaper Co.*, 415 Mass. 258, 263 (1993), and *Fleming v. Benzaquin*, 390 Mass. 175, 180-81, 454 N.E.2d 95 (1983). The First Circuit held that the statement expressed the chief's opinion, and that the opinion was based on disclosed nondefamatory facts and did not imply nondisclosed defamatory facts. *Id.* at 41-42.

Other cases relied on by Petitioners likewise fail to support their claim that there is a conflict with the holding in *Scholz*. *McRae v. Afro-American Co.*, 172 F. Supp. 184 (E.D. Pa. 1959), *aff'd* 274 F.2d 287 (3rd Cir. 1960), and *Rutt v. Bethlehems' Globe Pub. Co.*, 335 Pa. Super. 163, 484 A.2d 72 (1984), applied Pennsylvania law in addressing whether the statements at issue were capable of a defamatory meaning. In neither case did the court raise much less decide whether the statements were expressions of opinion or whether opinions were privileged under the First Amendment. And, obviously, neither court was a United States court of appeals or a state court of last resort. *See* Supreme Court Rule 10(b).

Finally, the Texas intermediate appellate court's decision in *Tatum v. Dallas Morning News, Inc.*, No. 05-14-01017-CV, 2015 WL 9582903, at *16 (Tex. App. Dec. 30, 2015), does not present "the other side of the conflict" as Petitioners claim. Pet. 25. In that case, the plaintiffs asserted that "[t]he false gist" of the newspaper column at issue was the assertion that they had dishonestly characterized the cause of their son's death as an automobile accident in a paid obituary to hide that he had in fact committed suicide. *Id.* at *10. In analyzing whether that statement expressed an opinion or stated facts, the court expressly distinguished both the SJC's decision in this case and *Gacek v. Owens & Minor Distrib., Inc.* from the case before it. According to the Texas Court of Appeals,

> "[t]hese cases are distinguishable because the case before us does not turn on the verifiability of the column's statement about the cause of Paul's suicide. Rather, this case turns on the verifiability of the column's accusation

> of deception against the Tatums. Accordingly, *Gacek* and *Scholz* are not on point.

Tatum, 2015 WL 9582903, at *16.

Thus, the Petitioners' claim that the holding in *Scholz* conflicts with decisions of other federal and state courts on "an important federal question" is not borne out by the cases they cite. These cases are primarily dealt with as a matter of state law. Even if there are differences among states in their common law and state constitutions, this would not present a conflict for this Court to resolve. *See Erie Railroad v. Tompkins*, 304 U.S. 64 (1938); *Smith v. Phillips*, 455 U.S. 209 (1982).

CONCLUSION

No one – least of all Micki – disputes the pain and suffering caused by suicide and the importance of our society redoubling its efforts to prevent suicide through education and improved medical understanding and treatment of its causes. But a thinly-disguised effort by losing defamation plaintiffs to impose greater liability for the exercise of free expression on grieving survivors is not the solution.

The Supreme Judicial Court's decision that Petitioners have no actionable claim for defamation presents no novel or important question of federal law, is consistent with, not contrary to, *Milkovich*, and rests on an independent and adequate state ground. Since no meaningful conflict over the meaning of *Milkovich* exists among state and federal decisions, there is no need to revisit that decision and, even if there were a need, this case would be a particularly unsuitable vehicle for doing so.

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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Dated: May 2, 2016

ADDENDUM A

Scholz v. Delp,

473 Mass. 242 (2015)

Official report version published by the Reporter of Decisions

Scholz *v.* Delp; Scholz *v.* Boston Herald, Inc.

DONALD THOMAS SCHOLZ & another[1] *vs.* MICKI DELP.
DONALD THOMAS SCHOLZ *vs.* BOSTON HERALD, INC., & others.[2]

Suffolk. November 4, 2014. - November 25, 2015.

Present: SPINA, BOTSFORD, DUFFLY, & LENK, JJ.

Libel and Slander. *Practice, Civil*, Summary judgment, Costs.

Discussion of a plaintiff's burden to withstand a defendant's motion for summary judgment on a defamation claim.

In a civil action in which the plaintiff asserted claims against a newspaper and its columnists concerning articles they wrote and published that allegedly insinuated that the plaintiff was responsible for a person's suicide, as well as claims against the person's former wife (whose statements appeared in the articles), the Superior Court judge properly granted summary judgment to the newspaper and columnists on a defamation claim, where the statements in the articles could not have been understood by a reasonable reader to have been anything but

[1] The DTS Charitable Foundation, Inc.

[2] Gayle Fee and Laura Raposa.

opinions regarding the reason the person committed suicide, where the use of cautionary terms in the articles relayed that the columnists were indulging in speculation, where the articles appeared in an entertainment news column replete with rhetorical flair, and where the logical nexus between the facts and the opinion was sufficiently apparent to render unreasonable any inference that the derogatory opinion must have been based on undisclosed facts; moreover, the plaintiff could not establish his claim of intentional infliction of emotional distress against the newspaper and columnists that was derivative of the defamation claim; further, summary judgment also was properly granted to the former wife on a defamation claim, where a reasonable reader of her statements in the articles would conclude that they either asserted nondefamatory facts or were opinions that did not imply undisclosed defamatory facts.

In a civil action, the judge did not abuse his discretion in awarding deposition costs to the defendants, where such costs may be awarded whether or not the deposition was actually used at trial, and where the judge carefully evaluated the costs as required by Mass. R. Civ. P. 54 (e).

CIVIL ACTION commenced in the Superior Court Department on October 12, 2007.

The case was heard by *John C. Cratsley*, J., on a motion for summary judgment.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

CIVIL ACTION commenced in the Superior Court Department on March 11, 2010.

The case was heard by *Frances A. McIntyre*, J., on a motion for summary judgment, and a motion for costs was heard by her.

The Supreme Judicial Court granted an application for direct appellate review.

Nicholas B. Carter (*Edward Foye & Seth J. Robbins* with him) for the plaintiffs.

Kathy B. Weinman for Micki Delp.

Jeffrey S. Robbins for Boston Herald, Inc.

Bruce D. Brown & Gregg P. Leslie, of the District of Columbia, *& Cynthia A. Gierhart*, of New York, for Reporters Committee for Freedom of the Press & others, amici curiae, submitted a brief.

DUFFLY, J. In the mid-1970s, Donald Thomas Scholz, a musician, composer, recording engineer, and record producer, founded the rock band "Boston." After many years playing in the band, Brad Delp, who was its lead singer, committed suicide on March 9, 2007. The Boston Herald, Inc., published three stories regarding Brad's suicide, written by columnists Gayle Fee and Laura Raposa, who relied on information from Brad's former wife, Micki Delp,[3] and various unnamed "insiders" and "friends." Scholz filed an action for defamation in the Superior Court against Micki, arguing that the statements made by her and reported in the newspaper articles insinuated that Scholz was responsible for Brad's suicide. Scholz later brought an action in the Superior Court for defamation and

[3] Because they share a last name, we refer to Brad Delp and Micki Delp by their first names.

intentional infliction of emotional distress against the Boston Herald, Inc., and its two columnists (collectively, the Herald), based on the same statements as reported in the three articles.

The two cases were consolidated in the Superior Court after Micki had filed a motion for summary judgment. In August, 2011, a Superior Court judge allowed Micki's motion, Scholz appealed, and the Appeals Court reversed.[4] See *Scholz* v. *Delp*, 83 Mass. App. Ct. 590 (2013). We granted Micki's petition for further appellate review. Thereafter, in ruling on the Herald's motion for summary judgment, a different Superior Court judge concluded that Scholz could not establish a required element of his libel claim, i.e., that the articles contained any false statements of fact, and allowed the Herald's motion for summary judgment on the ground that the reported statements constituted nonactionable opinion. The judge also allowed the Herald's motion for costs. We granted Scholz's

[4] When the appeal was heard in the Appeals Court, Micki apparently had not sought, and the judge had not entered, final judgment on the claim against her. The Superior Court docket sheet does not reflect that a motion under Mass. R. Civ. P. 54 (b), 365 Mass. 820 (1974), was filed, or that a rule 54 (b) certification was issued.

Where no final judgment had entered on that claim, Donald Thomas Scholz's appeal to the Appeals Court properly should have been dismissed as premature. See *Gangell* v. *New York State Teamsters Council Welfare Trust Fund*, 6 Mass. App. Ct. 631, 632, (1978). At this point, however, the judgment as to the Boston Herald, Inc., and its two reporters (collectively, the Herald) is final, the issues have been fully briefed by all parties, and the heavily interrelated claims are all before us. Because remand for further proceedings in the Superior Court would not be consistent with judicial economy, we exercise our discretion to decide the issues raised in Scholz's appeal from the decision allowing Micki's motion for summary judgment.

petition for direct appellate review, and paired the cases for argument.

We conclude that the newspaper articles and statements contained therein constitute nonactionable opinions based on disclosed nondefamatory facts that do not imply undisclosed defamatory facts. [5] Because the statements even arguably attributing responsibility for Brad's suicide to Scholz were statements of opinion and not verifiable fact, and therefore could not form the basis of a claim of defamation, we conclude that summary judgment properly was entered for the Herald by the second motion judge, and that the first motion judge correctly allowed Micki's motion for summary judgment.

1. *Background*. We summarize the undisputed facts, drawn from the summary judgment record. The band Boston was founded in 1975, after Scholz and Brad obtained a recording contract with CBS/Epic Records, and Scholz hired band members Barry Goudreau, Sib Hashian, and Fran Sheehan to join the group. The band toured very successfully for a number of years, but, approximately thirty years before Brad's death, there was a falling out between Scholz and the latter three band members. All of the original members of the group, other than Scholz and Brad, left the band. Scholz continued to tour with different group members, Scholz *v.* Delp; Sholz *v.* Boston Herald, Inc. including Brad, under the name "Boston." Fran Cosmo joined the band as a backup singer for Brad, and as he got older and had more difficulty reaching the high notes for which

[5] We acknowledge the amicus brief submitted by the Reporters Committee for Freedom of the Press and twenty-five others.

Boston was known, Brad was dependent on Cosmo's voice as backup to his. In addition to touring with the band, Brad maintained his friendship with the former members of the group, who had discontinued all contact with Scholz, and played with them when he was able to do so.

Brad had a long history of anxiety and depression. He suffered from stage fright before performances with Boston and with another group with which he had played in the early 1990s. In 1991, Brad was prescribed anti-anxiety medication, which did not help. Micki and Brad separated that year. They were divorced in 1996, after sixteen years of marriage, due to Brad's mental health issues, but they remained friends. Brad began dating Pam Sullivan in 2000; they were engaged on December 25, 2006, and planned to marry in August, 2007. Pam and her younger sister Meg[6] moved into Brad's house.

Sometime at the end of 2006, Scholz told Brad that Boston would be performing on tour in the summer of 2007, and that rehearsals for the tour would begin on March 24, 2007. On February 28, 2007, Scholz told Brad that the initial summer performances had been confirmed. While the plan had been that Cosmo would join the tour, that invitation was rescinded. On March 1, 2007, Scholz sent an electronic mail message to Brad advising him that the summer tour was not confirmed.

At around the same time, Meg discovered that Brad had taped a small camera to the ceiling in her bedroom. Brad sent electronic mail messages to Meg and her boy friend expressing his sorrow over having

[6] Because Pam and Meg Sullivan share a last name, we refer to them by their first names.

"victimized" her and saying that he had "committed the most egregious act against her." Meg responded, expressing concern that Brad would do something to harm himself. Brad replied, "I don't think anyone could think less of me as a person as I am feeling about myself at this moment." Two days later, Brad informed Pam of his installation of the camera; Pam also feared that Brad would harm himself.

Brad committed suicide on March 9, 2007, having purchased the means to do so on March 8. He left several suicide notes, including one addressed to Pam, one to Micki, one to his two adult children, one to Meg and her boy friend, and two for the public. One of the notes that were made public said, "Mr. Brad Delp. J'ai une solitaire. I am a lonely soul," and, "I take complete and sole responsibility for my present situation." The note also said, in reference to Pam, "[U]nfortunately she is totally unaware of what I have done."

In March, 2007, the Herald published two articles concerning Brad's suicide. The articles, written by Fee and Raposa, appeared in the newspaper's entertainment news column, "Inside Track." The first article, published on March 15, 2007, was titled, "Suicide confirmed in Delp's death," and stated that it was based on information from "unnamed insiders."[7]

The March 15 article stated, in relevant part:

> "Friends said it was Delp's constant need to help and please people that may

[7] Testimony from Gayle Fee during the course of this litigation confirmed that the "insider" information in the first article came from Brad's former manager, Paul Geary, and his long-time friend Ernie Boch, Jr., who also was a friend of Barry Goudreau and Sib Hashian.

> 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' 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 Goudreau'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.'
>
> " . . .
>
> "Scholz' 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.
>
> " . . .
>
> "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.' "

On the day the article was published, Fee made a radio appearance in which she said that Scholz had caused Brad nothing but "grief." On the same day, both Herald reporters spoke with Micki, who ultimately had agreed to their request for an interview after initially declining to give one. Following the interview, Fee sent an electronic mail message to Scholz's publicist, stating that Micki had said, "Brad was in despair because [Cosmo] was disinvited from the summer tour," and asking for comment. Scholz responded that the decision to fire Cosmo had been a group decision.

On March 16, 2007, the Herald published a front-page article entitled, "Pal's snub made Delp do it: Boston rocker's ex-wife speaks." The article stated, in relevant part:

> "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 . . . .

" '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.'

" . . .

> "Sullivan told police that Delp 'had been depressed for some time, feeling emotional (and) bad about himself,' according to the reports.
>
> "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.' "

On July 2, 2007, the Herald published a third article concerning Brad's suicide. The article, entitled "Delp tribute on," included a paragraph stating that Scholz and the original members of the band Boston "have 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."

2. *Discussion*. a. *Standard of review*. Summary judgment is appropriate where, "viewing the

evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Augat, Inc.* v. *Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991). See Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002). The moving party bears the burden of demonstrating the absence of a triable issue of fact on every relevant issue. See *Standerwick* v. *Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 32 (2006). "[The] party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if [the moving party] demonstrates . . . that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." *Ravnikar* v. *Bogojavlensky*, 438 Mass. 627, 629 (2003), quoting *Dulgarian* v. *Stone*, 420 Mass. 843, 846 (1995). "Because our review is de novo, we accord no deference to the decision of the motion judge." *Caron* v. *Horace Mann Ins. Co.*, 466 Mass. 218, 221 (2013), quoting *DeWolfe* v. *Hingham Ctr., Ltd.*, 464 Mass. 795, 799 (2013). The use of motions for summary judgment is favored in defamation cases. See *New England Tractor-Trailer Training of Conn., Inc.* v. *Globe Newspaper Co.*, 395 Mass. 471, 480 (1985), citing *Cefalu* v. *Globe Newspaper Co.*, 8 Mass. App. 71, 74 (1979), cert. denied, 444 U.S. 1060 (1980).

b. *Plaintiff's case on a defamation claim*. To withstand a motion for summary judgment on a defamation claim, a plaintiff must have a reasonable expectation of proving four elements: first, the defendant made a statement, of and "concerning the plaintiff, to a third party"; second, the "statement could damage the plaintiff's reputation in the

community"; third, the defendant was at fault for making the statement;[8] and fourth, the statement caused economic loss or, in four specific circumstances, is actionable without economic loss. See *Ravnikar* v. *Bogojavlensky*, *supra* at 629-630.

Furthermore, to be actionable, the statement must be one of fact rather than of opinion. "Statements of pure opinion are constitutionally protected," *King* v. *Globe Newspaper Co.*, 400 Mass. 705, 708 (1987), cert. denied, 485 U.S. 940 and 485 U.S. 962 (1988), "[b]ut there is no constitutional value in false statements of fact." *National Ass'n of Gov't Employees, Inc.* v. *Central Broadcasting Corp.*, 379 Mass. 220, 227 (1979), cert. denied, 446 U.S. 935 (1980), quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974) ("However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas"). Whether a statement is a factual assertion or an opinion is a question of law "if the statement unambiguously constitutes either fact or opinion," and a question of fact "if the statement reasonably can be understood both ways." *King* v. *Globe Newspaper Co.*, *supra* at 709, quoting *Aldoupolis* v. *Globe Newspaper Co.*, 398 Mass. 731, 733 (1986). See *Howell* v. *Enterprise Publ. Co.*, 455 Mass. 641, 671 (2010). While "[a] statement of fact is

[8] "The level of fault required varies between negligence (for statements concerning private persons) and actual malice (for statements concerning public officials and public figures)." *Ravnikar* v. *Bogojavlensky*, 438 Mass. 627, 630 (2003). Here, because Scholz concedes that he is a limited purpose public figure, to prevail he must prove that the challenged statements were made with actual malice. See *Astra USA, Inc.* v. *Bildman*, 455 Mass. 116, 143-144 (2009), cert. denied, 560 U.S. 904 (2010).

not shielded from an action for defamation by being prefaced with the words 'in my opinion,' " *Levinsky's, Inc.* v. *Wal-Mart Stores, Inc.*, 127 F.3d 122, 127 (1st Cir. 1997), quoting *Haynes* v. *Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993), a statement that does not contain "objectively verifiable facts" is not actionable. *Levinsky's, Inc.* v. *Wal-Mart Stores, Inc.*, *supra*, quoting *Haynes* v. *Alfred A. Knopf, Inc.*, *supra*. See *Cole* v. *Westinghouse Broadcasting Co.*, 386 Mass. 303, 312, cert. denied, 459 U.S. 1037 (1982) (statements which cannot be proved false cannot be deemed statements of fact).

As we have noted, "it is much easier to recognize the significance of the distinction between statements of opinion and statements of fact than it is to make the distinction in a particular case. . . . Nevertheless, sensible lines must be drawn." *King* v. *Globe Newspaper Co.*, *supra* at 709. In determining whether a statement reasonably could be understood as fact or opinion, a court must "examine the statement in its totality in the context in which it was uttered or published," and "must consider all the words used, not merely a particular phrase or sentence." *Cole* v. *Westinghouse Broadcasting Co.*, *supra* at 309, quoting *Information Control Corp.* v. *Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980). See *Driscoll* v. *Board of Trustees of Milton Academy*, 70 Mass. App. Ct. 285, 297 (2007). Factors to be considered include "the specific language used"; "whether the statement is verifiable"; "the general context of the statement"; and "the broader context in which the statement appeared," see *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 9 (1990), quoting *Scott* v. *News-Herald*, 25 Ohio St. 3d 243, 250 (1986); as well as any "cautionary terms used by the person publishing the

statement." *Lyons* v. *Globe Newspaper Co.*, 415 Mass. 258, 263 (1993), quoting *Fleming* v. *Benzaquin*, 390 Mass. 175, 180 (1983).

c. *Claims against the Herald*. Scholz contends that the Herald articles are actionable because they impliedly assert that Scholz was responsible for Brad's death. To support his argument that the articles contain actionable statements of fact, Scholz points in particular to the headline of the March 16, 2007, article, "Pal's snub made Delp do it: Boston rocker's ex-wife speaks." We do not agree.

We begin with the observation that, ordinarily, ascertaining the reason or reasons a person has committed suicide would require speculation; although a view might be expressed as to the cause, rarely will it be the case that even those who were close to the individual will know what he or she was thinking and feeling when that final decision was made. While we can imagine rare circumstances in which the motivations for a suicide would be manifestly clear and unambiguous, this is not such a case.

The statements at issue could not have been understood by a reasonable reader to have been anything but opinions regarding the reason Brad committed suicide. "[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, . . . the statement is not actionable." *Haynes* v. *Alfred A. Knopf, Inc.*, *supra* at 1227. See *Milkovich* v. *Lorain Journal Co.*, *supra* at 9. See, e.g., *Gacek* v. *Owens & Minor Distrib., Inc.*, 666 F.3d 1142, 1147-1148 (8th Cir. 2012) (concluding that "anyone is entitled to speculate on a person's motives from the known facts of his behavior," and that statements that plaintiff

"pushed [the decedent] over the edge," was "the straw that broke the camel's back," and "was the reason for [the decedent's] death" were nonactionable because they did not express objectively verifiable facts but, rather, were defendant's "theory" or "surmise" as to decedent's motives in taking his own life [citation omitted]). Cf. *National Ass'n of Gov't Employees/Int'l Bhd. of Police Officers* v. *BUCI Tel., Inc.*, 118 F. Supp. 2d 126, 131 (D. Mass. 2000) ("the interpretation of another's motive does not reasonably lend itself to objective proof or disproof").

In addition, the use of cautionary terms in the articles, such as "may have" and "reportedly," relayed to the reader that the authors were "indulging in speculation." See *King* v. *Globe Newspaper Co.*, *supra* at 713. See also *Milkovich* v. *Lorain Journal Co.*, *supra* at 31 ("[c]autionary language . . . put[s] the reader on notice that what is being read is opinion" [quotation omitted]); *Cole* v. *Westinghouse Broadcasting Co.*, *supra* at 309, quoting *Information Control Corp.* v. *Genesis One Computer Corp.*, *supra* at 784 ("the court must give weight to cautionary terms used by the person publishing the statement"). The most extreme language appeared in the headline, which a reasonable reader would not expect to include nuanced phrasing. See *Test Masters Educ. Servs., Inc.*, v. *NYP Holdings, Inc.*, 603 F. Supp. 2d 584, 589 (S.D.N.Y. 2009) ("A newspaper need not choose the most delicate word available in constructing its headline; it is permitted some drama in grabbing its reader's attention, so long as the headline remains a fair index of what is accurately reported below"). See, e.g, *Dulgarian* v. *Stone*, 420 Mass. 843, 850-851 (1995) (title of television news series, "Highway

Robbery?," reporting on automobile insurance appraiser's business, constituted "rhetorical flourish or hyperbole, which is protected from defamation liability").

Moreover, the Herald articles appeared in an entertainment news column. See *Cole* v. *Westinghouse Broadcasting Co.*, *supra* at 309, quoting *Information Control Corp.* v. *Genesis One Computer Corp.*, *supra* at 784 ("the court must give weight to . . . the medium by which the statement is disseminated and the audience to which it is published"). "While not on the 'op-ed' page of the newspaper, the article[s were] replete with rhetorical flair." *Howell* v. *Enterprise Publ. Co.*, *supra* at 671-672. In context, a reasonable reader would consider the statements about the cause of Brad's suicide to have been nothing more than conjecture or speculation, reflecting the opinion of the speaker. See *Moldea* v. *New York Times Co.*, 22 F.3d 310, 314 (D.C. Cir.), cert. denied, 513 U.S. 875 (1994) (context of statements "helps determine the way in which the intended audience will receive them").

Scholz argues that, even if we conclude that the articles contained statements of opinion rather than facts, the use of the words "insiders" and "friends" in the "Inside Track" column indicated the existence of undisclosed defamatory facts. We recognize that there is no "wholesale defamation exemption for anything that might be labeled 'opinion.' " *Milkovich* v. *Lorain Journal Co.*, *supra* at 18. Even a statement that is "cast in the form of an opinion may imply the existence of undisclosed defamatory facts on which the opinion purports to be based, and thus may be actionable." *King* v. *Globe Newspaper Co.*, 400 Mass. 705, 713 (1987). By contrast, an opinion "based on disclosed or assumed nondefamatory facts is not

itself sufficient for an action of defamation, no matter how unjustified or unreasonable the opinion may be or how derogatory it is." *Dulgarian* v. *Stone*, 420 Mass. 843, 850 (1995), quoting *Lyons* v. *Globe Newspaper Co.*, *supra* at 262.

We conclude that, here, "[t]he logical nexus between the facts and the opinion was sufficiently apparent to render unreasonable any inference that 'the derogatory opinion must have been based on undisclosed facts.' " *Lyons* v. *Globe Newspaper Co.*, *supra* at 266, quoting Restatement (Second) of Torts § 566 comment c, second par. (1977). The first article stated that Brad "tried to please both sides," and was the "man in the middle of the bitter break-up"; that "[Scholz] made him do the Boston stuff and the other guys were mad they weren't a part of it"; and that, consequently, Brad "was always under a lot of pressure." The article then commented that "the never-ending bitterness may have been too much for the sensitive singer to endure."

The second article stated that Brad "was driven to despair after his longtime friend . . . Cosmo was dropped from a summer tour, the last straw in a dysfunctional professional life that ultimately led to the sensitive frontman's suicide." This conclusion was based on Micki's statements that "[n]o one can possibly understand the pressures he was under"; Brad "was in such a predicament professionally that no matter what he did, a friend of his would be hurt"; Brad lived his life to please everyone else and was the "kind of guy" who, "[r]ather than hurt anyone else, . . . would hurt himself"; Brad was upset that the invitation to Cosmo to join the band's planned summer tour had been rescinded; Brad was still upset over the lingering bad feelings from the breakup of the band; and Boston was a job, he did

what he was told, but "it got to the point where he just couldn't do it anymore."[9] The second article also stated that Brad "had been depressed for some time." The third article referred back to the previous two articles in stating that "lingering bad feelings from the breakup of the original band . . . reportedly drove [Brad] to take his own life."

By laying out the bases for their conclusions, the articles "clearly indicated to the reasonable reader that the proponent of the expressed opinion engaged in speculation and deduction based on the disclosed facts." See *Lyons* v. *Globe Newspaper Co.*, *supra* at 266. It does not appear "that any undisclosed facts [about Scholz's role in Brad's suicide] are implied, or if any are implied, it is unclear what [those might be]." See *Cole* v. *Westinghouse Broadcasting Co.*, 386 Mass. 303, 313 (1982). Moreover, it is entirely unclear (even assuming that facts are implied) that they are defamatory facts. See *id.*

Because the statements are nonactionable opinion, and Scholz therefore cannot prevail on his defamation claim, he also cannot establish the derivative claim of intentional infliction of emotional distress. See *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 57 (1988); *Rotkiewicz* v. *Sadowsky*, 431 Mass. 748, 755 (2000).

d. *The Herald's motion for costs*. Scholz also challenges on appeal the allowance of the Herald's motion for costs, in the amount of $132,163.89, for stenographic services, deposition transcripts, fees for service of subpoenas, and court filing fees. We review a decision awarding costs for abuse of discretion, see

[9] The second article noted also that, according to Scholz, "the decision to drop Cosmo was not final and Delp was not upset about the matter."

Waldman v. *American Honda Motor Co.*, 413 Mass. 320, 328 (1992), and discern none here.

Scholz argues that many of the depositions were not reasonably necessary to decide the case, because the judge's decision rested "solely on a reading of the [newspaper] articles," and, accordingly, the decision to allow the Herald's motion for costs must be reversed. In the alternative, Scholz argues that costs should have been awarded only as to the depositions that he sought and conducted, and not as to depositions sought and conducted by the Herald. We reject Scholz's claim that, in deciding whether to award costs, a judge may consider only the cost of depositions that were noticed by the party against whom summary judgment entered. It is evident from the decision on the Herald's motion for summary judgment that the judge relied extensively on the deposition record; Scholz's claim that the depositions did not affect that decision is unavailing. Moreover, deposition costs may be awarded "whether or not the deposition was actually used at the trial." Mass. R. Civ. P. 54 (e), as amended, 382 Mass. 829 (1981). See, e.g., *Federico* v. *Ford Motor Co.*, 67 Mass. App. Ct. 454, 462-463 (2006) (awarding costs for depositions even where parties eventually settled and defendant was dismissed from case). The judge's decision on the motion for costs reflects careful evaluation of the deposition costs, as required by Mass. R. Civ. P. 54 (e).

e. *Defamation claim against Micki*. While the Herald articles cite statements about the causes of Brad's death from a number of people who knew Brad, the bulk of the statements noted are reported

as having been made by Micki.[10] For the same reasons that the Herald articles are nonactionable, we conclude that Micki's statements contained therein likewise are nonactionable. See *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 9 (1990), quoting *Scott* v. *News-Herald*, 25 Ohio St. 3d 243, 250 (1986). A reasonable reader of the Herald articles would conclude that Micki's statements either asserted nondefamatory facts or were opinions that did not imply undisclosed defamatory facts. Even if the statements could have appeared to a reasonable reader to contain defamatory connotations, the facts upon which the opinions were based were "apparent and disclosed." See *National Ass'n of Gov't Employees, Inc.* v. *Central Broadcasting Corp.*, 379 Mass. 220, 226 (1979).

A reasonable reader might reach a determination that the statements that Brad was upset about the lingering bad feelings from the breakup of the band, and about the decision to rescind the invitation to Cosmo to join the tour, were factual. These statements, however, do not defame Scholz. A reasonable reader also could conclude that Brad was under pressure as a result of tensions between members of the band, in reliance on Micki's statements that "Brad lived his life to please everyone else"; Brad "was in such a predicament professionally that no matter what he did, a friend of his would be hurt"; and "[n]o one can possibly understand the pressures he was under." These statements also do not defame Scholz. See *Yohe* v. *Nugent*, 321 F.3d 35, 40-41 (1st Cir. 2003).

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[10] In her deposition testimony, Micki asserted that she had made the statements attributed to her.

A reasonable reader also could decide, based on Micki's statements in the articles, that in Micki's opinion, pressure from the band caused Brad to commit suicide. According to the articles, Micki believed that Brad was the "kind of guy" who would hurt himself rather than hurt anyone else; "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"; and dropping Cosmo from the tour drove Brad to despair and ultimately to suicide.[11] Whether Brad's motive rested, alone or in combination, on any of the reasons propounded by Micki — Brad's growing weariness at being the middleman between the warring former band members, despondency about the possible cancellation of the tour and the absence of Cosmo from the tour, distress over the bitter feud and Scholz's role in it, or preexisting depression and anxiety — is no longer capable of verification. As discussed *supra*, statements that cannot be proved false cannot be deemed statements of fact. See *Cole* v. *Westinghouse Broadcasting Co.*, *supra* at 312. Moreover, as noted, it is unclear what, if any, undisclosed defamatory facts are implied by Micki's opinion that Brad committed suicide because of the general pressure of being caught in the middle of feuding band members and the specific stress of the withdrawal of the invitation to Cosmo to join the band's tour. See *Yohe* v. *Nugent*, *supra* at 41-42.

Based on any of the above combinations, reasonable readers would conclude, in these circumstances, that the statements concerning Brad's motivations in deciding to take his own life were opinions, given the context and the speculative

[11] Reviewing the record in the light most favorable to Scholz, we attribute this last statement to Micki.

nature of the comments on the multiple proffered reasons for Brad's suicide. "[A]nyone is entitled to speculate on a person's motives from the known facts of his behavior." *Haynes* v. *Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993). See *Yohe* v. *Nugent*, *supra*. See also, e.g., *Gacek* v. *Owens & Minor Distrib., Inc.*, 666 F.3d 1142, 1147-1148 (8th Cir. 2012).

3. *Conclusion*. The judgment granting summary judgment to the Herald defendants is affirmed, and the order allowing the Herald's motion for costs also is affirmed. The order allowing Micki's motion for summary judgment is affirmed. The matters are remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.

ADDENDUM B

Article 16 of the Massachusetts Constitution

Article 16 of the Massachusetts Constitution:

> *Article XVI.* The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth. The right of free speech shall not be abridged.