No. 15-

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

PETITION FOR WRIT OF CERTIORARI

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Whether 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 action.

PARTIES TO THE PROCEEDING

Petitioners are Donald Thomas Scholz and The DTS Charitable Foundation, Inc. Respondents are Micki Delp, Boston Herald, Inc., Gayle Fee, and Laura Raposa.

RULE 29.6 STATEMENT

The DTS Charitable Foundation, Inc. has no parent corporation, and no publicly held corporation owns more than 10% of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Donald Thomas Scholz and The DTS Charitable Foundation, Inc. respectfully petition for a writ of certiorari to review the judgment of the Massachusetts Supreme Judicial Court ("SJC").

OPINIONS BELOW

The opinion of the SJC (Pet. App. 1a) is published at 41 N.E.3d 38 (Mass. 2015). The opinions of the Massachusetts Superior Court (Pet. App. 36a, 52a) are published at *Scholz v. Delp*, 29 Mass.L.Rptr. 172 (Mass. Super. 2011), and *Scholz v. Boston Herald, Inc.*, 31 Mass.L.Rptr. 315 (Mass. Super. 2013). The opinion of the Massachusetts Appeals Court (Pet. App. 25a) is published at *Scholz v. Delp*, 988 N.E. 2d 4 (Mass. App. 2013).

JURISDICTION

The judgment of the SJC was entered on November 25, 2015. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, infringing on the freedom of the press. . . ."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or

shall any state deprive any person of life, liberty, or property without due process of law."

STATEMENT

This case presents the fundamental question of whether the First Amendment creates a categorical presumption exempting from defamation actions statements about a person's motive in committing suicide, on the basis that such statements are generally matters of "opinion" rather than "fact." The Massachusetts SJC held that the First Amendment does create such a presumption and that, as a result, Petitioner Scholz – the producer, primary songwriter, and lead musician in the rock band "Boston" – cannot proceed with his defamation actions against the *Boston Herald*, two of its reporters, and its principal source, for falsely accusing Mr. Scholz of causing the suicide of the band's lead singer, Brad Delp.

The SJC deepened a significant conflict among many state and federal courts as to whether statements about the cause of a particular suicide, and about motive more generally, are categorically exempt from claims of defamation. It also departed from this Court's core holding in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), that there is no need to create a special First Amendment privilege for statements that can be labeled opinion. This Court emphasized that creating such a privilege would tilt the balance too far against the important interest in protecting personal reputation against unjustified

invasion. And it explained that existing First Amendment limits on defamation actions suffice to protect freedom of expression.

The SJC opined that it was applying one of these existing limits in concluding that statements purporting to link Petitioner Scholz to Delp's suicide were not actionable, because they "d[id] not contain 'objectively verifiable facts.'" *See* Pet. App. 13a (quoting *Levinsky's Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 127 (1st Cir. 1998), quoting *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993)). That limit is grounded in this Court's conclusion that "a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection," at least when the defendant is a member of the media. *Milkovich*, 497 U.S. at 19-20 (citing *Philadelphia Newpapers, Inc. v. Hepps*, 475 U.S. 767 (1986)).

But in concluding that the statements accusing Petitioner Scholz of causing Delp's suicide were not verifiable and thus not actionable, the SJC created a special rule for the cause of suicides: it asked whether Delp's motive for suicide was "manifestly clear and unambiguous." *Id.* at 15a. By applying a standard of verifiability it does not apply elsewhere, the SJC created the new First Amendment privilege that *Milkovich* abjured.

The SJC held 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 motivation for a suicide would be manifestly clear and unambiguous, this is not such a case.

Id. at 15a. The SJC reached the conclusion that the purported link between Petitioner Scholz and Delp's suicide could not be proved false as part of a summary judgment determination, and it did so without evaluating the extensive record evidence introduced by Petitioner Scholz showing that he had nothing to do with Delp's suicide. Instead, the SJC relied on the categorical conclusion of the Eighth Circuit that "'anyone is entitled to speculate on a person's motives from the known facts of his behavior. . . . '" *Id.* (citing *Gacek v. Owens & Minor Distrib., Inc.*, 666 F.3d 1142, 1147-48 (8th Cir. 2012)). In siding with the Eighth Circuit, the SJC deepened a conflict with other state and federal courts and also failed to follow this Court's decision in *Milkovich*.

1. Petitioner Scholz created the rock group Boston in 1975. Brad Delp was one of the original

members. Pet. App. 4a. After a falling-out within the group in the early 1980s, several members left the group. *Id.* For more than 25 years thereafter, Scholz and Delp continued to tour as Boston with new group members. Pet. App. 4a-5a, 26a.

On March 9, 2007, Delp committed suicide. He did not blame Scholz for his action. He left four private suicide notes and two public notes. Pet. App. 6a. One of the private notes was to his children. It revealed "emotional issues" dating back to when Delp was a child. That was consistent with Delp's long history of depression. Pet. App. 5a.

A second private note was to Meg Sullivan, the younger sister of Brad Delp's fiancee, and to Sullivan's boyfriend. Sullivan lived in Delp's home. Nine days before Delp committed suicide, Sullivan discovered that Delp had taped a small camera to the ceiling of her bedroom. Pet. App. 5a. Delp subsequently sent Sullivan emails expressing his sorrow at having "victimized" her and stating that he had "committed that most egregious act against" her. *Id.* at 5a-6a. He added: "I have made a mess of the lives of my three closest friends. I don't know if I will ever forgive myself for that."

Sullivan was so alarmed by the tone of Delp's e-mails that she wrote him: "I am very concerned for you," and asked for assurance that "you aren't planning anything harmful to yourself." Pet. App. 55a. Tragically, that did not deter Delp, who

committed suicide days later. Delp left a note to Sullivan and her boyfriend apologizing

> for the heartache I have caused you both. That being said, I want to be certain that you understand that the path that I have currently chosen for myself was laid out by me, and solely by me, in truth before either of you was born. I have had bouts of depression, and thoughts of suicide since I was a teenager. It was all but inevitable that things would wind up this way for me.

Delp also left a private note to his fiancee and one to his ex-wife Micki Delp. Pet. App. 6a. He also left two public suicide notes. None of the notes mentioned Scholz, the group Boston, or anything to do with Delp's professional life.

2. After Delp's death, the *Boston Herald* published three articles in March through July 2007 purporting to link Petitioner Scholz to Delp's suicide. The articles did not mention any other potential cause, such as the incident with Meg Sullivan.[1]

The *Herald* published the first discussion of Delp's suicide in a March 2007 column on entertainment news. The article focused on Delp's relationship with the original members of the group Boston:

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[1] The full text of each of these articles is set forth at Pet. App. 81a-89a. The full text of two subsequent articles, published five years later, is set forth at Pet. App. 90a-98a.

> Friends said it was Delp's constant need to help and please people that may have driven him to despair. He was literally the man in the middle of the bitter break-up of Boston – pulled from both sides by divided loyalties.

Pet. App. 82a. The article indicated that Petitioner Scholz had caused the bitter break up of Boston through his purported "penchant for perfection and his well-chronicled control issues [that] led to long delays between albums. As a result, [the other band members] released an album without him, which led to an irretrievable breakdown." *Id.*

The article said this breakdown continued to impose pressures on Delp for years, because Scholz "made" Delp continue to perform with Boston, angering former bandmates:

> Delp tried to please both sides by continuing to contribute his vocals to Scholz's Boston projects while also remaining close to his former bandmates. . . . "Tom [Scholz] made him do the Boston stuff and other guys were mad that they weren't a part of it," said another insider. "He was always under a lot of pressure. . . ."

Id.. The article concluded that a recent incident precipitated by Petitioner Scholz had increased those pressures, driving Delp to suicide:

> 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 . . . and then had his people call and substitute himself and Delp for the gig, sources say.

Id.

For months afterwards, the *Herald* continued to publish articles in the same vein. A day after the first article, the *Herald* ran a second article under the page 1 headline, "PAL's SNUB MADE DELP DO IT." Pet. App. 85a. The snub that supposedly "MADE DELP DO IT" was Petitioner's purported decision to disinvite Fran Cosmo, a friend of Delp's who had long toured with Boston, from an upcoming summer tour. The *Herald's* source for this claim purportedly was Micki Delp, Brad Delp's ex-wife, who had a vendetta against Petitioner Scholz – as the *Herald* knew.[2] Micki Delp had told Petitioner Scholz's publicist "I'll make sure that Brad [Delp]'s suicide is pinned on Tom [Scholz]," and "I am f***ing sick of Tom." Pet. App.26a-27a.

The *Herald* did not inform its readers of this vendetta, but instead made it appear that Micki Delp had special insight. Hours before publishing the March 16 article, the *Herald* put up on its website an article from the AP that made clear that Micki Delp had received a private suicide note from Brad Delp. In light of this background information,

[2] She also later denied having said much of what the *Herald* reported. *See infra* at pp. 32-33.

many readers read the *Herald*'s March 16 article as implying that Delp's statements in the article were based on insight from the private suicide note when in fact, that note did not mention him.

The March 16 article stated:

> 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. . . .
>
> 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.). . . .
>
> 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 [other] 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. . . .

> [Micki Delp 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."

Pet. App. 85a-88a.

Several months later, on July 2, 2007, the *Herald* ran a third article that reported that Scholz and former band members "have been at odds for decades and the lingering bad feelings from the breakup of the original band more than twenty years ago reportedly drove singer Delp to take his own life in March." Pet. App. 89a.

In May 2012, the *Herald* ran two more articles about Delp's suicide. Pet. App. 90a-98a. By this point the *Herald* had e-mails and testimony from this litigation that showed the anguish Delp had reported just prior to his suicide over the incident with Meg Sullivan. But the *Herald's* articles again unmistakably conveyed the conclusion that Scholz's mistreatment of Delp was the cause of his decision to take his own life. *Id.*[3]

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[3] The 2012 articles noted, without any details, that in this litigation Petitioner had argued that Delp killed himself as a result of "an extremely embarrassing and upsetting incident that occurred between Delp and a close friend." Pet. App. 97a. But the articles did not describe the incident at all or Petitioner's reaction to it, as an article in the *Boston Globe* later detailed, and the articles referenced the issue only as part of an inaccurate attempt to explain the incident away. *See* www.boston.com/ae/music/articles/2012/05/27/boston_singer_brad_delp's_final_days_marked_by_crisis_over_hidden_camera/.

The *Herald* thus repeatedly attributed Delp's suicide to Scholz without any exploration of other causes.

3. On the basis of the *Herald* articles, Petitioner Scholz sued both Micki Delp and the *Herald* (along with its two reporters Gayle Fee and Laura Raposa) for defamation. He sued Micki Delp on October 12, 2007 and sued the *Herald* on March 11, 2010. The suits were subsequently consolidated. Pet. App. 2a.

a. During summary judgment briefing, Petitioner Scholz introduced strong evidence that Delp's suicide had nothing to do with him; that his relationship with Delp was consistently good; that Petitioner Scholz had never required Delp to work with him; that Delp was not upset about events surrounding the 2007 Boston tour; that Delp *was* so deeply disturbed about the incident with Meg Sullivan that those closest to him feared he might take his own life; and that none of Delp's suicide notes so much as *mentioned* Petitioner Scholz. *See supra* at pp. 3-5.

b. The Massachusetts Superior Court granted summary judgment for Micki Delp on August 23, 2011. Pet. App. 35a. It concluded that the *Herald* articles *were* susceptible of a defamatory connotation that Petitioner Scholz caused Brad Delp's suicide and that at least one statement potentially attributable to Micki Delp contained causal language and thus *was* potentially false ("the last straw. . . that ultimately led to. . . suicide"). *Id.* at 44a-46a.

50a. But the court held that the *Herald* writers, not Micki Delp, were responsible for the defamatory connotation (Pet. App. 45a-46a), and also that there was no evidence that Micki Delp's statements met the actual malice standard required in this defamation case. *Id.* at 50a.

c. A different Massachusetts Superior Court judge granted summary judgment for the *Herald* in March 2013. Pet. App. 52a. Like the first judge, she concluded that the *Herald* articles were susceptible of a defamatory connotation that Petitioner Scholz caused Brad Delp to commit suicide. *Id.* at 66a-70a. But she differed from the first judge as to whether any of the statements were provably false. In her view, "[n]o one ever knows what actually motivated the person – in that last tortured moment – to end his life,'" and thus statements about that motive are constitutionally protected. *Id.* at 53a. She held that it was "impossible" for Petitioner Scholz to "disprove the proposition that he was the actual cause of [Brad Delp's] suicide." *Id.* at 74a. This was so in the judge's view "despite the amassing of powerful evidence of [Brad Delp's] mental state. . . ." *Id.* at 53a.

d. The Massachusetts Court of Appeals reversed the summary judgment decision in favor of Micki Delp and held Petitioners' suit against Micki Delp could proceed. Pet. App. 35a. It held that there was a genuine issue of material fact as to whether Micki Delp had made the statements attributed to her in the articles, and if so, whether she was responsible

for the defamatory connotation of the articles, whether the statements implied undisclosed facts as their basis, and whether Micki Delp had the requisite degree of fault: namely, knowledge that the connotation was false or reckless disregard for the truth. Pet. App. 30a-35a.

4. The SJC granted review of the Massachusetts Appeals Court decision in Petitioners' action against Micki Delp and also granted direct review of the Superior Court decision in Petitioners' action against the *Herald* even though that decision had not yet been reviewed by the Appeals Court. The SJC reversed the decision of the Massachusetts Appeals Court in the *Delp* action and affirmed the decision of the Superior Court in the *Herald* action, thereby barring Petitioners from proceeding against either Micki Delp or the *Herald.*

The SJC held that the *Herald*'s statements "arguably attributing Brad [Delp's] suicide to Scholz" were not actionable, because they were statements of "pure opinion," Pet. App. 19a, a term used in *King v. Globe Newspaper Co.*, 512 N.E.2d 241, 244 (1987), which in turn relied on *Aldoupolis v. Globe Newspaper Co.*, 500 N.E. 2d 794, 796 (Mass. 1986)). In *Aldoupolis*, the SJC had stated that "statements of pure opinion as distinguished from mixed opinion are protected by the First Amendment to the United States Constitution." *Id.* at 796.[4]

[4] The other cases the court cited were also First Amendment cases. *See, e.g., Pritsker v. Brudnoy*, 452 N.E.2d

The SJC recognized that under this Court's decision in *Milkovich* "there is no 'wholesale defamation exemption for anything that might be labeled opinion.'" Pet. App. 17a (quoting *Milkovich*, 497 U.S. at 18). *See also* Pet. App. 13a (recognizing that a statement is not shielded from a defamation action by being labeled opinion). But "a statement that does not contain 'objectively verifiable facts' is not actionable." *Id.* (quoting *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)).

The SJC held that the statements in the *Herald* articles that blamed Petitioner Scholz for Delp's suicide were not falsifiable and thus could not be actionable. Pet App. 15a-19a. In reaching this conclusion, the SJC applied a categorical (and essentially irrebuttable) presumption that the cause of suicide is not provable. It stated that:

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227 (Mass. 1983); *Cole v. Westinghouse Broadcasting Co., Inc.*, 435 N.E.2d 1021 (Mass 1982); *Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122 (1st Cir. 1997). The court also cited to a statement from *National Ass'n of Gov't Employees, Inc. v. Central Broadcasting Corp.,* 379 Mass. 220, 227 (1979), quoting this Court's First Amendment decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). Thus, the SJC did not state an intent to rely on an independent and adequate state-law ground, and there are no such grounds that would preclude this Court's review. *See Michigan v. Long*, 463 U.S. 1032, 1040 & n.6 (1983); *Milkovich*, 497 U.S. at 10 n. 5 (quoting *Long,* 463 U.S. at 1040–1041).

> 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 motivation for a suicide would be *manifestly clear and unambiguous*, this is not such a case.

Pet App. 15a (emphasis added).

The SJC did not explain the derivation of the "manifestly clear and unambiguous" standard it applied. Nor did it explain why Petitioner Scholz failed to meet this standard *at the summary judgment stage*. It did not assess, evaluate, or weigh the compelling evidence that Petitioner Scholz was not the cause of Brad Delp's suicide – evidence that Brad Delp had a history of depression, that he was not upset at Petitioner Scholz, and that he was deeply disturbed about the incident with Meg Sullivan – even though it mentioned much of this evidence in its background section. Pet. App. 4a-6a. And when the SJC explained its rejection of the defamation claim against Micki Delp, it held flatly that "[w]hether Brad's motive rested, alone or in combination, on any of the reasons propounded by Micki . . . is no longer capable of verification. As discussed *supra*, statements that cannot be proved

false cannot be deemed statements of fact." Pet. App. 23a.[5]

By rejecting Petitioners' defamation claims without even evaluating the evidence, the SJC made clear that the "circumstances" it said it "[could] imagine" satisfying the "manifestly clear and unambiguous" standard are so "rare" as to be effectively a nullity. As a practical matter, the SJC held that statements placing blame for suicide are exempt from defamation actions. Indeed, the court relied on the categorical language of other courts. It quoted approvingly the Eighth Circuit's conclusion that "'anyone is entitled to speculate on a person's motives from the known facts of his behavior. . . .'" Pet. App. 15a (quoting *Gacek v. Owens & Minor Distrib., Inc.*, 666 F.3d 1142, 1147-48 (8th Cir. 2012)). The court also cited the even more sweeping conclusion of the District of Massachusetts that "'the interpretation of another's motive does not

[5] With respect to the defamation claims against the *Herald* (but not against Micki Delp), the court also noted that "in addition," use of cautionary terms in the article put the reader on notice that the authors could not be interpreted as stating facts, but instead were engaged in speculation. Pet. App. 16a. For this, the Court relied in part on a statement from Justice Brennan's *dissent* in *Milkovich*. *Id.* (quoting *Milkovich*, 497 U.S. at 31 (Brennan, J., dissenting)). The court discounted the categorical language in the *Herald*'s headline ("PAL's SNUB MADE DELP DO IT"), on the basis that language in the headline mattered *less* than other language as "a reasonable reader would not expect [a headline] to include nuanced phrasing." *Id.* The SJC also noted that the *Herald* articles appeared in an entertainment news column. *Id.* at 17a.

reasonably lend itself to objective proof or disproof.'" Pet. App. 16a (quoting *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 SJC also considered and rejected an alternative argument made by Petitioners: that even if the statements linking Scholz to Delp's suicide were not provably false, they implied the existence of undisclosed defamatory facts that could be proven false. The SJC said that there were no implied facts. The underlying facts were stated in the articles. Pet. App. 17a-19a.

REASONS FOR GRANTING THE WRIT

It has now been more than 25 years since *Milkovich*, this Court's last significant decision on the impact of the First Amendment on defamation claims and, in particular, on the distinction between "facts" and "opinions." But since then, an important question that divided the courts prior to *Milkovich* has continued to divide them: whether statements placing blame for a suicide are categorically presumed exempt from defamation claims. That is part of a larger conflict: whether statements about motive more generally can give rise to a claim of defamation consistent with the First Amendment.

This Court should grant plenary review and resolve these conflicts by holding that the First Amendment does not create a categorical presumption that statements attributing blame for suicide cannot be the subject of a defamation claim.

Doing so would reaffirm the balance this Court struck in *Milkovich* between the First Amendment's "vital guarantee of free and uninhibited discussion of public issues," and society's "'pervasive and strong interest in preventing and redressing attacks upon reputation.'" *Id.* at 22 (quoting *Rosenblatt v. Baer*, 383 U.S. 75 (1966)).

The Court struck this balance against the background protections it had already held were created by the First Amendment. From 1964 to 1988, this Court rendered a series of decisions explaining important limits the First Amendment places on defamation claims. Throughout these decisions, the Court recognized that "there is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974). But the Court emphasized the need to create breathing room for freedom of expression by requiring proof of fault well beyond mere negligence for statements about public figures, and by exempting from defamation claims speech that cannot be reasonably read as a literal claim about facts in the world.[6]

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[6] In *New York Times v. Sullivan*, 376 U.S. 254 (1964), for example, the Court held that public officials cannot recover damages for defamation related to their official conduct absent proof of "actual malice" – proof that the defamatory statement was made with knowledge or reckless disregard of falsity. It subsequently extended the "actual malice" requirement to speech about "public figures." *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). And in *Philadelphia Newpapers, Inc. v. Hepps*, 475 U.S. 767 (1986), the Court held that defamation

In *Milkovich*, this Court considered whether the First Amendment created yet another limit – precluding defamation claims based on all statements that could be labeled "opinion." The respondents had argued for such a privilege based on dicta from *Gertz:* "Under the First Amendment there is no such thing as a false idea. 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." 418 U.S. at 339-40.

This Court rejected the creation of an additional exemption. It explained that existing First Amendment doctrine already provided all the protection for speech that was necessary and appropriate. It explained, for example, that the line of cases that includes *Hustler*, *Bresler,* and *Letter Carriers* already "provides protection for statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." 497 U.S. at 20 (quoting *Falwell*, 485 U.S. at 50). And *Philadelphia Newpapers, Inc. v. Hepps*, 475 U.S. 767 (1986), already "ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full

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plaintiffs "must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant." *Id.* at 777. Finally, in *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6 (1970), *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), and *Letter Carriers v. Austin*, 418 U.S. 264 (1974)), the Court held that statements that were mere hyperbole, or parody could not be the basis of a defamation action.

constitutional protection.'" *Id.* at 20. Indeed, even before *Hepps*, a statement could not give rise to a defamation action unless it was demonstrably false. *See Hepps*, 475 U.S. at 778 ("We therefore do not break new ground here in insulating speech that is not even demonstrably false.").

Milkovich held that going beyond this guidance to create a new privilege for opinion would exempt speech that should be subject to a defamation claim. The Court explained that:

> Opinions often imply facts, and one shouldn't be able to escape liability for a false factual implication by saying "I think that. . .": "If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth."

Such a statement should be subject to a defamation claim so long as it meets the other First Amendment requisites for such a claim (such as proof of actual malice). *Milkovich* teaches that there is no need to create an artificial dichotomy between opinion and fact. *See* 497 U.S. at 19.

Categorically exempting all statements that could be labeled "opinion" from defamation claims, the Court explained, would tip the balance too far against protection of reputation from unjustified invasion. The Court emphasized the importance of the latter interest: "'[t]he right of a man to the protection of his own reputation from unjustified

invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty.'" *Id.* at 22 (quoting *Rosenblatt*, 383 U.S. at 92-93 (Powell, J., concurring)).

In the more than 25 years since *Milkovich*, however, courts have continued to reach conflicting results on the types of statements that are provably false under *Milkovich* and thus potentially subject to defamation claims. In this case, the Massachusetts SJC joined a line of courts that have held facts unprovable in the defamation context – here, facts relating to the motive for suicide – that are routinely proven outside that context, departing from the core holding of *Milkovich* by creating a new category of defamation actions barred by the First Amendment. This Court's plenary review is amply warranted.

I. This Court Should Grant Review to Resolve a Deep and Abiding Conflict among Courts as to Whether Statements about Motive Generally, and about Motive for Suicide Specifically, Are Categorically Exempt From Defamation Claims

The Massachusetts SJC's decision deepens an existing conflict among state courts and federal courts of appeal. That conflict is not limited to cases involving suicide. It extends to cases about human motivation more generally.

1. On one side of the divide are courts that, like the SJC, have held that statements regarding

motivation for suicide, and motivation more generally, are categorically presumed incapable of verification or falsification and thus exempt from defamation claims. In *Gacek v. Owens & Minor Distribution, Inc.,* 666 F.3d 1142 (8th Cir. 2012), for example, the Eighth Circuit affirmed a summary judgment decision holding that plaintiff could not prove he was defamed by statements implying that he had caused a co-worker's suicide — that plaintiff had "pushed Showers over the edge," and that plaintiff "was the reason for Bill's death." *Id.* at 1147. Like the Massachusetts SJC here, the Eighth Circuit held that such statements were not objectively verifiable, but instead merely reflected the defendant's theory or surmise from known facts. *Id.* at 1148. Similarly, in *Yohe v. Nugent*, 321 F.3d 35, 40-41 (1st Cir. 2003), the First Circuit held that a statement that the plaintiff had been suicidal could not support a defamation claim where facts on which the statement was based (witness statements and reports) were disclosed, letting the reader evaluate whether the facts justified the conclusion. *Id.* at 41-42.

The decisions holding that statements about motive are non-verifiable extend beyond cases on motive for suicide. For example, the Seventh Circuit concluded that a statement about a man's motives for leaving one woman for another likely would be nonactionable statements of opinion, because the motives could not be known "for sure":

> As for Luther's motives for leaving Ruby for Dorothy, they can never be known for sure (even by Luther) and anyone is entitled to speculate on a person's motives from the known facts of his behavior. Luther Haynes left a poor woman for a less poor one, and Lemann drew a natural though not inevitable inference. He did not pretend to have the inside dope. He and Ruby claim insight, not information that the plaintiff might be able to prove false in a trial.

Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1226 (7th Cir. 1993).

A number of state courts have reached similar results. *See, e.g., West v. Thompson Newspapers,* 872 P.2d 999, 1019 (Utah 1994) (purporting to apply *Milkovich* to hold that statements that a public official "intended to dupe voters into electing him mayor by misrepresenting his position on municipal power is something only West himself knows, not something that is subject to objective verification"); *Collins v. Cox Enterprises, Inc.,* 452 S.E.2d 226, 227 (Ga. Ct. App. 1994) (purporting to apply *Milkovich* to hold that defendant's "conjecture regarding Collins' motive" – that Collins hoped to fool voters by running for "office under the name John Frank Collins while Joe Frank Harris was governor" – "cannot be proven as *absolutely true or false* and therefore is the sort of opinion that is not actionable as libel") (emphasis added).

2. On the other side of the conflict are the many courts that have held that statements regarding the motive for a suicide, and motive more generally, *can* give rise to a defamation claim that is not barred by the First Amendment.

For example, state and federal courts in Pennsylvania have twice permitted defamation actions to go forward based on statements attributing blame for a suicide. *See McRae v. Afro-American Co.*, 172 F.Supp. 184, 185 (E.D.Pa. 1959), *aff'd* 274 F.2d 287 (3rd Cir. 1960) (holding that it was not error to submit to the jury a mother's claim that she was defamed by an article that implied she had a role in her daughter's suicide by putting severe pressure on her over her grades); *Rutt v. Behlehems' Globe Pub. Co.*, 484 A.2d 72 (Pa. Super. 1984) (holding that plaintiff could proceed with claim asserting he was defamed by article implying that he had contributed to his son's suicide by showing lack of personal love and asking him to leave home).

Shortly after the Massachusetts SJC issued the decision at issue here, the Texas Court of Appeals discussed the SJC's decision in the course of reaching a conflicting result. *See Tatum v. Dallas Morning News, Inc.*, No. 05-14-01017-CV, 2015 WL 9582903, at *16 (Tex. App. Dec. 30, 2015). The Texas Court of Appeals held that parents of a suicide victim could sue the *Dallas Morning News* over a column that they said implied that they (1) were responsible for their son's suicide by turning a blind eye to his purported mental illness, and (2) that they

had lied in their son's obituary about the cause of his death by attributing his death to an automobile accident eight days prior to his death. *Id.* at *7. The Tatums claimed the column was defamatory, because they were not lying and could not have intervened regarding their son's purported mental illness, as their son had no such illness. They said the obituary accurately reflected their understanding that their son's death resulted from a car accident, as his suicide was caused by a brain injury suffered in the automobile accident. *Id.* at *1.

The Texas court departed from the Massachusetts SJC's decision in this case and held that the column could be read to have the defamatory implications the Tatums claimed. *Id.* at *7-9. The Texas court opined that a factfinder could rely on evidence related to the cause of the son's suicide, such as expert testimony linking brain injury to suicide, to assess whether the article falsely accused the Tatums of deception. *Id.* at *10-12. The court added that it did not matter whether all of the individual factual statements about the Tatums were literally true if the defamatory implications could be proven false. *Id.* at *11. The court further held that the defamatory implications could be proven false as required by *Hepps* and *Milkovich*. *Id.* at *15-16. It explained that a factfinder could evaluate the verity of the defamatory implications based on evidence that the Tatums' son had no history of mental illness, that the Tatums had investigated the cause of the suicide and found no

suicide note, that the Tatums had found evidence that their son had hit his head in the accident, and that the Tatums had found evidence linking brain injury to suicide. *Id.* at *15.

The Texas court opined that the jury could consider expert testimony that brain injury can lead to suicide, rejecting objections that this evidence was too speculative. *Id.* at *10-12. The court also held that statements implying the existence of a deceptive intent can be proved false in a defamation action. The Texas court explained:

> Calling someone a liar and accusing someone of perjury, . . . both implicate the person's mental state, because both "liar" and "perjury" denote the willful telling of an untruth. Nevertheless, the *Milkovich* Court concluded that calling someone a liar and accusing someone of perjury are both sufficiently verifiable to support a defamation claim.

Id. at *15 (citing *Milkovich*, 497 U.S. at 19-21).

The decision in *Tatum* departs markedly from that of the SJC in this case. In fact, the *Tatum* court declined to follow the cases on which the SJC relied. The SJC relied heavily on cases such as *Haynes* that held that claims about motivation ordinarily cannot be proven false. *See* Pet. App. 13a, 15a, 23a. *Tatum* explained that it was "not necessarily convinced" by the Seventh Circuit's decision in *Haynes*, and also said that "[t]o the extent" the Utah Supreme Court's

decision in *West* "is similar to the instant case, we disagree with it." 2015 WL 9582903 at 16.[7]

The conflict presented by this case extends beyond statements about suicide. In contrast to cases like *Haynes* and *West*, many courts have concluded that statements regarding motive are verifiable and thus can be the basis of a defamation claim consistent with the First Amendment. They have, for example, permitted defamation claims based on statements: (1) implying that a doctor recommended a hysterectomy out of desire for personal gain despite knowing it was unnecessary, *see Kanaga v. Gannett Co.*, 687 A.2d 173, 181 (Del. 1996); (2) that the plaintiff was "out to get" a particular institution of higher learning, *see Nazeri v. Missouri Valley Coll.*, 860 S.W.2d 303, 310-11 (Mo. 1993), and (3) accusing a judge of corruption, *see Bentley v. Bunton*, 94 S.W. 3d 561, 583 (Tex. 2002). Indeed, the majority of courts have held that "the

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[7] *Tatum* purported to distinguish the SJC's decision here on the basis that "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." *Id.* at *16. But in fact there is a deep conflict between the cases. The Tatums claimed they were libeled *both* by the implication that they were deceptive *and* by the implication that they had contributed to their son's suicide by turning a blind eye towards his mental illness. Under the SJC's reasoning, statements regarding the cause of suicide are presumptively non-actionable, absent "manifestly clear and unambiguous" proof otherwise.

imputation of a corrupt or dishonorable motive in connection with established facts'" is actionable. *Id.* at 581 (quoting *A.S. Abell Co. v. Kirby,* 227 Md. 267, 176 A.2d 340, 343 (1961) (citations omitted)).

The SJC's decision here thus deepens a conflict that has percolated for many years. Lower courts have struggled with this issue long enough. The instant case presents an ideal vehicle to address this important question.

II. This Court Should Grant Review Because the SJC's Ruling Conflicts with *Milkovich* by Creating a First Amendment Exemption from Defamation Actions Not Previously Recognized by this Court.

The Massachusetts SJC purported to apply *Milkovich*, but in reality its judgment conflicts squarely with this Court's decision in that case. The SJC interpreted the First Amendment to create a new categorical limit on defamation suits – contradicting the basic holding of *Milkovich* that there is no need for any new limit, and upsetting the delicate balance that *Milkovich* struck between protecting freedom of expression and protecting personal reputation from unjustified invasion. It has done so by treating statements considered verifiable outside the defamation context as non-verifiable within it.

Outside the defamation context, the SJC has recognized that [t]he state of a man's mind is as much a fact as the state of his digestion."

Commonwealth v. Althause, 93 N.E. 202, 206 (Mass. 1910) (internal quotation and citation omitted). Indeed, even in the defamation context, the SJC has previously recognized that "[a] given state of mind is a fact that can be proved like any other, and indeed, is proved in every criminal prosecution" and many other contexts. *Tech Plus Inc. v. Ansel,* 793 N.E. 2d 1256*,* 1265 (2003).

That is in accord with this Court's decisions. This Court has held that it is possible for someone to utter an actionable (even criminally actionable) lie about his or her state of mind even with respect to a religious belief protected by the First Amendment. *United States v. Ballard*, 322 U.S. 78, 86-88 (1944). It has also expressly permitted proof of motive in defamation cases – permitting proof of the defendant's state of mind as part of proof of actual malice. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 668 (1989).

These conclusions cannot suddenly cease to be applicable simply because a case happens to involve a person who has committed suicide. The state of mind of a suicide victim is frequently proven in litigation. In *Freyermuth v. Lutfy*, 382 N.E.2d 1059, 1064-64 (Mass. 1978), for example, the SJC upheld a finding of wrongful death of a suicide victim based on evidence that an automobile accident was the proximate cause of the suicide. Other cases are to similar effect. *See, e.g., Stepakoff v. Kantar,* 473 N.E. 2d 1131, 1135 (Mass. 1986) (holding that in wrongful death claim against psychiatrist for

patient's suicide, proper instruction was whether patient died as a result of psychiatrist's negligence); *Miga v. City of Holyoke*, 497 N.E. 2d 1, 4-5 (1986) (upholding judgment against police for suicide while in protective custody); *cf. e.g., Estate of Tobin v. Smithkline Beecham Pharmaceuticals*, 2001 WL 36102161 (D. Wy. 2001) (permitting expert testimony to show manufacturer of pharmaceutical liable for murder suicide).

But in the instant case, the SJC did not treat the motive for suicide as a "fact that can be proved like any other." Without any discernable justification, the SJC held that the motive for suicide cannot be proven unless that motive is "manifestly clear and unambiguous," a categorical presumption against such proof that the SJC does not apply anywhere else – and that is flatly incompatible with this Court's instruction throughout its First Amendment jurisprudence against crafting new categorical presumptions.[8] That presumption precluded

[8] For example, the Court refused to carve out from First Amendment any novel exception for depictions of animal cruelty, holding that it would instead apply existing doctrine. *United States v. Stevens*, 559 U.S. 460, 472 (2010). And it relied on context- specific factors to hold that inflammatory speech outside a military funeral was protected by the First Amendment. *Snyder v. Phelps,* 562 U.S. 443 (2011) The Court noted that "'the sensitivity and significance of the interests presented in clashes between First Amendment and [state law] rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.'" *Id.* at 459 (quoting *Florida Star v. B.J. F.,* 491 U.S. 524, 533 (1989)).

Petitioners from proving falsity here even though they presented what the Superior Court correctly labeled "powerful evidence of Brad [Delp's] state of mind." Pet. App. 53a.

The SJC's approach cannot be justified by *Hepps* or the other existing limitations on which *Milkovich* relied to protect freedom of expression. In *Hepps*, this Court limited defamation actions by placing the burden of proof on the plaintiff to prove falsity, but it did not *also* heighten the standard of proof of falsity, much less do so to the point that proof becomes virtually impossible.[9] It explained that by placing

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In his concurrence, Justice Breyer explained that in First Amendment cases, the Court "has reviewed the underlying facts in detail, as will sometimes prove necessary where First Amendment values and state-protected (say, privacy-related) interests seriously conflict." *Id.* at 462 (Breyer, J., concurring). And in dissent, Justice Alito evaluated the specific context of the speech and concluded that First Amendment provided no protection to the speech in question which met the elements for intentional infliction of emotional distress, and that this was so regardless of the truth or falsity of the speech. *Id.* at 462, 465, 475 (Alito, J., dissenting). Categorically extending First Amendment immunities from liability is simply the mirror image of categorically carving exemptions from First Amendment protections, and the Court has rejected both approaches.

[9] Plaintiffs do face a heightened burden of proof in proving actual malice, and this impacts even a summary judgment determination. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (explaining impact on summary judgment on requirement that plaintiff prove actual malice with clear and convincing evidence).

the burden on the plaintiff to prove falsity, "there will be *some* cases in which plaintiffs cannot meet their burden despite the fact that the speech is in fact false," whereas placing the burden on defendant would have the opposite effect. *Id.* at 776-77 (emphasis added). The Court underscored that its "decision adds only marginally to the burdens that the plaintiff must already bear. . . ." *Id.* at 778.

The *Hustler*, *Bresler,* and *Letter Carriers* line of cases, *see supra* at 19 &n.6, do not remotely justify the SJC's approach either. They exempt from defamation actions statements such as parodies that are not actually making the factual claims a literal reading would suggest. Here, the statements at issue *were* making a factual claim: that Petitioner Scholz caused Delp's suicide.

Finally, the *New York Times* "actual malice" standard cannot be invoked to justify the SJC's decision. Under the SJC's approach, it is irrelevant whether the *Herald* made its statements linking Petitioner Scholz to Delp's suicide with reckless disregard for their truth, or even knowledge of their falsity, because, in the SJC's remarkable view, the truth as to the cause of a person's suicide can virtually *never* be "known" for sure. Here, Petitioners presented evidence that the *Herald* published its original articles while *knowing* that Micki Delp not only had a vendetta against Scholz, but also that she did not even make some of the comments on which the *Herald* relied. *See, e.g.,* Pet. App. 30a-32a (holding there was a genuine dispute

as to whether Micki Delp was accurately quoted in the article). Petitioners also presented evidence that the *Herald* continued to link Petitioner Scholz to Delp's suicide even after it became aware of the details of the incident with Meg Sullivan and the details of Delp's suicide notes. *See supra* at 10. Under the SJC's approach, however, all of this evidence was categorically irrelevant, and it did not matter whether this constituted reckless disregard for the truth, as Petitioners' claims were barred regardless. The epistemology undergirding so bizarre a demand for certitude confounds even the concept of proof beyond a reasonable doubt carefully fashioned in the criminal context and cannot be permitted to stand.

Indeed, the SJC's decision is at odds even with the principal example and specific holding of *Milkovich*. *Milkovich* provided the following example:

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

> damage to reputation as the statement, "Jones is a liar."

Id. at 19-20 (emphasis added). Exactly the same can be said here.

And with respect to the specific issue before it, *Milkovich* held that "the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false." *Id.* at 21-22. Under the SJC's approach, issues of motive are presumptively non-actionable even though they, too, can be "sufficiently factual to be susceptible of being proved true or false."

The decision of the SJC is thus inconsistent with *Milkovich* and its stricture against creating a new First Amendment privilege beyond those already recognized.[10] The SJC's approach goes far beyond existing First Amendment limitations to take the step *Milkovich* refused – creating a special privilege for speech that can be called "opinion" because its accuracy cannot be refuted with absolute certitude.[11] In doing so, it severely tips the balance against the

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[10] This Court subsequently explained that *Milkovich* stands for the proposition that "a defamatory assessment of facts can be actionable even if the facts underlying the assessment are accurately presented." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1097 (1991).

[11] This is not a case involving a new technological or similar issue. Thus, even if such an issue could warrant consideration of a novel First Amendment privilege, there is no basis for such consideration here. Suicide has been with us for millennia.

important interest that drove the decision in *Milkovich* – the protection of "reputation from unjustified invasion and wrongful hurt. . . at the root of any decent system of ordered liberty.'" 497 U.S. at 22 (quoting *Rosenblatt*, 383 U.S. at 92-93 (Powell, J., concurring)).

III. This Court Should Grant Review Because of the Importance of the Question Presented.

Review is also warranted because of the great importance of limiting false statements about the cause of suicide. Such statements are both particularly likely and particularly pernicious.

Suicide is the tenth leading cause of death in the United States and the second leading cause among the 15-34 year old age group, according to the most recent statistics from the Centers for Disease Control.[12] There are more deaths from suicide in the United States each year than from motor vehicle accidents -- an average of 33,000 suicide deaths a

[12] www.cdc.gov/injury/images/lc-charts/leading_causes_of_death_by_age_groupo_2013-a.gif.

year.[13] The rate of suicide is even higher among veterans, averaging at least 22 suicides a day.[14]

Yet the causes of suicides are frequently misreported. For example, "American psychiatrists have found that 90 percent of suicides in our country appear to be associated with a mental illness."[15] Yet that is not what is generally portrayed. This is in part because, as the Surgeon General and National Action Alliance for Suicide Prevention explain, "the sensational sells."[16]

Recently, for example, many articles have asserted that teens who committed suicide did so as a result of cyber-bullying, but there appears to be no scientific evidence of a connection.[17] As one report

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[13] *2012 National Strategy for Suicide Prevention: Goals and Objectives for Action: A Report of the U.S. Surgeon General and of the National Action Alliance for Suicide Prevention* ("*2012 National Strategy*"), available at http://www.ncbi.nlm.nih.gov/ books/NBK109919 (citing data from 2001 through 2009).

[14] http://www.cnn.com/2013/09/21/us/22-veteran-suicides-a-day/.

[15] Goldsmith SK, Pellmar TC, Kleinman AM, Bunney WE, eds., *Reducing suicide: a national imperative*, Washington DC: National Academy Press (2002).

[16] *2012 National Strategy*, available at http://www.ncbi.nlm.nih.gov/books/NBK109919.

[17] *See* Kelly Mc Bride, *Bullying Is Not On The Rise And It Does Not Lead To Suicide*, Poynter, Oct 25, 2013, http://www.poynter.org/2013/bullying-is-not-on-the-rise-and-it-does-not-lead-to-suicide/227095.

explained, "in perpetuating these stories, which are often little more than emotional linkbait, journalists are complicit in a gross oversimpification of a complicated phenomenon. In short, we're getting the facts wrong."[18] Wylie Tene, the public relations manager for the American Foundation for Suicide Prevention, said of one such story: "[e]verything we know about unsafe reporting is being done here – describing the method(s), the simplistic explanation (bullying = suicide), the narrative that bullies are the villains and the girl that died, the victim."[19]

In other cases, rather than blaming cyberbullies, articles reflexively blame friends or family members. In one recent example, a multitude of articles blamed the suicide of a 13 year-old girl, Izabel Laxamana, on a "shaming" video posted by her father, but a later article revealed that "the real story about what led Izabel to take her own life is nothing like the tale being spun online. [Police Department Spokeswoman] Cool said Izabel's father never posted the video online. . . ." The later article was entitled *Police Reveal Real Reason Girl Jumped From Bridge After Shaming Video Was Posted.*[20]

Such false and sensational stories "are not consistent with suicide prevention," according to the Surgeon General and National Action Alliance for

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[18] *Id.*

[19] *Id.*

[20] *See* http://fox8.com/2015/06/10/police-reveal-reason-girl-jumped-from-bridge-no-charges-expected/.

Suicide Prevention.[21] Indeed, they may tragically increase suicides by increasing the risk of suicide contagion.[22]

These sensational stories also can cause severe harm to those falsely accused of causing the suicide. In instances, like the one in this case, where a friend or family member is blamed for a suicide, the reputational and emotional toll exacted from the person wrongly accused can be particularly significant. "Suicide exacts a heavy toll on those left behind as well. Loved ones, friends, classmates, neighbors, teachers, faith leaders, and colleagues all feel the effect of these deaths."[23] This heavy toll is dramatically compounded when friends or loved ones are falsely blamed for contributing to the suicide. But the SJC's decision below shields from suit those who propound such false stories no matter how reckless they are in doing so. And, to compound the harm further, the SJC, far from resting its judgment on Massachusetts law, wrongly blames the First Amendment for that travesty of justice.

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[21] *2012 National Strategy*, available at http://www.ncbi.nlm.nih.gov/books/NBK109919.

[22] Emily Bazelon, *Two Girls Charged With Felony Stalking in Rebecca Sedwick Case. That's Not the Answer*, available at http://www.slate.com/blogs/xx_factor/2013/10/15/rebecca_sedwick_suicide_case_two_girls_charged_with_felony_stalking.html.

[23] *2012 National Strategy*, available at http://www.ncbi.nlm.nih.gov/books/NBK109919.

This case presents an important question meriting this Court's plenary review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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Dated: February 23, 2016

APPENDIX

Appendix A

Supreme Judicial Court of Massachusetts,
Suffolk

Donald Thomas SCHOLZ & another[1]

v.

Micki DELP.

Donald Thomas Scholz

v.

Boston Herald, Inc., & others.[2]

SJC–11511, SJC–11621

November 5, 2015

Before 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

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[1] The DTS Charitable Foundation, Inc.

[2] Gayle Fee and Laura Raposa.

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] 41 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 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

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

[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*

Mass.App.Ct. 590, 988 N.E.2d 4 (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 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

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Fund, 6 Mass.App.Ct. 631, 632, 381 N.E.2d 1308, (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.

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, 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 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

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

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 "victimized" her and saying that he had "committed

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

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:

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[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.

Friends said it was Delp's constant need to help and please people that may have driven him to despair. He was literally the man in the middle of the bitter break-up of Boston—pulled from both sides by divided loyalties.

Delp remained on good terms with both Tom Scholz, the MIT grad who founded the band, and Barry Goudreau, Fran Sheehan and Sib Hashian, former members of Boston who had a fierce falling out with Scholz in the early '80s.

Delp tried to please both sides by continuing to contribute his vocals to Scholz' 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, 571 N.E.2d 357 (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, 849 N.E.2d 197 (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, 782 N.E.2d 508 (2003), quoting *Dulgarian v. Stone,* 420 Mass. 843, 846, 652 N.E.2d 603 (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, 993 N.E.2d 708 (2013), quoting *DeWolfe v. Hingham Ctr., Ltd.,* 464 Mass. 795, 799, 985 N.E.2d 1187 (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, 480

N.E.2d 1005 (1985), citing *Cefalu v. Globe Newspaper Co.,* 8 Mass.App. 71, 74, 391 N.E.2d 935 (1979), cert. denied, 444 U.S. 1060, 100 S.Ct. 994, 62 L.Ed.2d 738 (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, 782 N.E.2d 508.

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.

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[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, 782 N.E.2d 508 (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, 914 N.E.2d 36 (2009), cert. denied, 560 U.S. 904, 130 S.Ct. 3276, 176 L.Ed.2d 1183 (2010).

705, 708, 512 N.E.2d 241 (1987), cert. denied, 485 U.S. 940, 108 S.Ct. 1121, 99 L.Ed.2d 281 and 485 U.S. 962, 108 S.Ct. 1227, 99 L.Ed.2d 427 (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, 396 N.E.2d 996 (1979), cert. denied, 446 U.S. 935, 100 S.Ct. 2152, 64 L.Ed.2d 788 (1980), quoting *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 339–340, 94 S.Ct. 2997, 41 L.Ed.2d 789 (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, 512 N.E.2d 241, quoting *Aldoupolis v. Globe Newspaper Co.,* 398 Mass. 731, 733, 500 N.E.2d 794 (1986). See *Howell v. Enterprise Publ. Co.,* 455 Mass. 641, 671, 920 N.E.2d 1 (2010). While "[a] statement of fact is not shielded from an action for defamation by being prefaced with the words 'in my opinion,' " *Levinksy'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. *Levinksy'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, 435 N.E.2d 1021, cert. denied, 459 U.S. 1037, 103 S.Ct. 449, 74 L.Ed.2d 603 (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, 512 N.E.2d 241. 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, 435 N.E.2d 1021, 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, 873 N.E.2d 1177 (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, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), quoting *Scott v. News–Herald,* 25 Ohio St.3d 243, 250, 496 N.E.2d 699 (1986); as well as any "cautionary terms used by the person publishing the statement." *Lyons v. Globe Newspaper Co.,* 415 Mass. 258, 263, 612 N.E.2d 1158 (1993), quoting *Fleming v. Benzaquin,* 390 Mass. 175, 180, 454 N.E.2d 95 (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, 110 S.Ct. 2695. 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, 512 N.E.2d 241. See also *Milkovich v. Lorain Journal Co., supra* at 31, 110 S.Ct. 2695 ("[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, 435 N.E.2d 1021, 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, 652 N.E.2d 603 (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, 435 N.E.2d 1021, 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, 920 N.E.2d 1. 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, 115 S.Ct. 202, 130 L.Ed.2d 133 (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, 110 S.Ct. 2695. 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, 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, 612 N.E.2d 1158.

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, 612 N.E.2d 1158, 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, 612 N.E.2d 1158. 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, 435 N.E.2d 1021 (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

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[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."

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, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988); *Rotkiewicz v. Sadowsky,* 431 Mass. 748, 755, 730 N.E.2d 282 (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 *Waldman v. American Honda Motor Co.,* 413 Mass. 320, 328, 597 N.E.2d 404 (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, 854 N.E.2d 448 (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, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), quoting *Scott v. News–Herald,* 25 Ohio St.3d 243, 250, 496 N.E.2d 699 (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,*

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

Inc. v. Central Broadcasting Corp., 379 Mass. 220, 226, 396 N.E.2d 996 (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).

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

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

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, 435 N.E.2d 1021. 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 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.

Appendix B

Appeals Court of Massachusetts,

Suffolk

Donald Thomas SCHOLZ & another[1]

v.

Micki DELP.

No. 12–P–450

May 14, 2013

Before CARHART, J.

The plaintiffs appeal from the entry of summary judgment for the defendant. Because we discern genuine issues of material fact, which must be resolved by the fact finder, we reverse.

Background. The plaintiff,[2] Donald Thomas Scholz, brought a claim of defamation against the

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[1] The DTS Charitable Foundation, Inc.

[2] The claims by DTS Charitable Foundation, Inc. were dismissed by the judge. Although it filed a notice of appeal, and is a nominal party to this appeal, it offers no argument on any of the claims that were dismissed.

defendant Micki Delp (Micki), the ex-wife of Brad Delp (Brad). In order to give context to the claim, a brief history of the parties' relationship is necessary. In the mid–1970s, Scholz and Brad founded the rock group "BOSTON." Over the next several years, the group, which included Sib Hashian and Barry Goudreau, enjoyed enormous commercial success. Eventually, as is common in the industry, the band suffered a fractious break-up. Goudreau quit the band in 1981 and Hashian quit later in the 1980s. Thereafter, Scholz kept the name of the band and continued touring without the original members, aside from Brad. During this time, Brad maintained a professional relationship with Scholz, while continuing to maintain friendships with the other members of the original band, who were estranged from Scholz.

Micki and Brad were married for sixteen years. The marriage ended in divorce in 1996. The two rarely saw each other after the divorce, but maintained contact about matters regarding their children. They last spoke on February 28, 2007. On March 9, 2007, Brad committed suicide. He left behind several suicide notes, including one to Micki.

In her affidavit, Gail Parenteau, the publicist for "BOSTON and its principal musician [Scholz]," states that on March 14, 2007, she received a telephone call from Micki. During that telephone call, Micki "stated that she was out to get [Scholz]" and that she was "f––––ing sick of [Scholz]." Parenteau's affidavit further alleges that on March 15, 2007, she received another telephone call from Micki, during which Micki stated that "she was going to make sure to ruin [Scholz]."

Micki also told Parenteau that "Brad's death was [Scholz's] fault," and "that she was hell-bent on doing everything in her power to make sure that people knew that Brad's suicide had to do with his unhappiness with [Scholz]."

The Boston Herald published an article about Brad's death on March 15, 2007. Also on March 15, 2007, Micki spoke with Gayle Fee, a writer for the Boston Herald, about Brad's death. On March 16, 2007, the Boston Herald published an article, written by Fee and Laura Raposa, entitled, "Pal's snub made [Brad] do it: Boston rocker's ex-wife speaks." The article contained the following language:

> Boston lead singer [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, [Brad's] ex-wife said.
>
> No one can possibly understand the pressures he was under,' said [Micki], the mother of [Brad'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] said, "which upset Brad."...
>
> According to [Micki], Brad was upset over the lingering bad feelings from the ugly breakup of the band Boston over 20 years ago. [Brad] continued to work with Scholz and Boston but also gigged with [Goudreau], Fran Sheehan and [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.
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> "[Goudreau] and [Hashian] 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."

Procedural history. In October, 2007, Scholz filed a verified complaint against Micki, alleging defamation. In March, 2010, Scholz brought a defamation suit against the Boston Herald based on the March 15 and 16, 2007, articles. The two actions were consolidated in July, 2010. Summary judgment

in favor of Micki was entered on August 23, 2011, from which Scholz filed a notice of appeal.[3]

Discussion. In order to survive a motion for summary judgment in an action for defamation, the plaintiff must establish that genuine issues of material fact exist with regard to the following four elements: (1) the defendant made a false statement to a third party of and concerning the plaintiff; (2) the statement has a defamatory connotation; (3) "[t]he defendant was at fault in making the statement"; and (4) the plaintiff suffered a loss as a result.[4] *Ravnikar v. Bogojavlensky,* 438 Mass. 627, 629–630, 782 N.E.2d 508 (2003). We review a grant of summary judgment de novo, looking to the summary judgment record to determine "whether, 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." *Roman v.*

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[3] At oral argument, the panel asked whether a judgment pursuant to Mass.R.Civ.P. 54(b), 365 Mass. 820 (1974), had been entered, and were told that it had. There is no indication in the Superior Court docket that a rule 54(b) motion was filed or that a rule 54(b) certification was obtained. In light of the fact that the issues have been fully briefed and argued, and in the unusual circumstances of this case, we exercise our discretion and review the merits presented. Cf. *Politano v. Selectmen of Nahant,* 12 Mass.App.Ct. 738, 740–741, 429 N.E.2d 31 (1981).

[4] The fourth, and last, element is not in dispute on the issue whether summary judgment should have been granted in this case.

Trustees of Tufts College, 461 Mass. 707, 710–711, 964 N.E.2d 331 (2012).

1. *Defamatory connotation.* The judge concluded that the March 16, 2007, article was susceptible to a defamatory connotation; however, he attributed the defamatory connotation to the Boston Herald writers, rather than Micki:

> While the article as a whole could be read by some to contain a defamatory meaning as to Scholz because of the possible leap or inference a reader might make that turmoil in Brad's professional life, possibly caused by Scholz, played a role in Brad's suicide, none of the statements attributed to Micki make that connection, either explicitly or implicitly.... [I]t is the Boston Herald writers who create the connection to Scholz and the possible implication that Scholz was responsible for the 'dysfunction' and thus, Brad's suicide.[5]

We disagree. There is a genuine dispute between Micki and the Boston Herald writers as to precisely what Micki said that resulted in the publication of the article in question, a dispute that cannot be determined as matter of law. The article was entitled, "Pal's snub made [Brad] do it: Boston rocker's ex-wife

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[5] The judge determined that certain statements in the March 16, 2007, article are attributable to Micki, but that those statements "are about Brad and his mental state at the time of his suicide."

speaks." Micki was acutely aware that Scholz managed and had oversight of the band, and that this was known in the music business industry. Micki was also aware that Brad's suicide would be the subject of local and national news. Although Micki denies making some of the statements that formed the basis of the March 16, 2007, article, the Boston Herald writers contend that Micki was accurately quoted.[6] Thus, a genuine question of fact arises from this record why the article was published and what portion, if any, of the article's statements are attributable to Micki. See *Reilly v. Associated Press,* 59 Mass.App.Ct. 764, 773, 797 N.E.2d 1204 (2003) ("A jury should be allowed to consider whether the Herald's report on that point was false"). This process was truncated when the judge determined that the Boston Herald writers, rather than Micki, were responsible for the defamatory nature.

Further, Micki concedes that the article could be construed as blaming Scholz for Brad's death. There was evidence that some BOSTON fans also construed the article in the same way. "A false statement that 'would tend to hold the plaintiff up to scorn, hatred, ridicule or contempt, in the minds of any considerable and respectable segment in the community,' would be considered defamatory." *Phelan v. May Dept. Stores Co.,* 443 Mass. 52, 56, 819 N.E.2d 550 (2004), quoting

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[6] Micki's statements as a whole, and in particular that "[n]o one can possibly understand the pressures he was under," imply undisclosed facts as their basis. See *Lyons v. Globe Newspaper Co.,* 415 Mass. 258, 262–264, 612 N.E.2d 1158 (1993).

from *Stone v. Essex County Newspapers, Inc.,* 367 Mass. 849, 853, 330 N.E.2d 161 (1975). Considering the evidence "with an indulgence in the plaintiff's favor," *Lyons v. New Mass Media, Inc.,* 390 Mass. 51, 57, 453 N.E.2d 451 (1983), quoting from *National Assn. of Govt. Employees, Inc. v. Central Bdcst. Corp.,* 379 Mass. 220, 231, 396 N.E.2d 996 (1979), cert. denied, 446 U.S. 935, 100 S.Ct. 2152, 64 L.Ed.2d 788 (1980), we conclude that Scholz has presented sufficient evidence to demonstrate a genuine issue of material fact whether Micki is responsible for the defamatory connotation of the March 16, 2007, article.

2. "*Of and concerning.*" In order to prove that Micki's statements were "of and concerning" Scholz, Scholz must demonstrate either that Micki intended her words to refer to him and that they were so understood, or that Micki's words could be reasonably interpreted to refer to him and that Micki was negligent in publishing them in such a way. See *New England Tractor–Trailer Training of Conn., Inc. v. Globe Newspaper Co.,* 395 Mass. 471, 483, 480 N.E.2d 1005 (1985); *Godbout v. Cousens,* 396 Mass. 254, 264, 485 N.E.2d 940 (1985). Regarding this element, the judge found that because the defamatory connotation of the March 16, 2007, article is attributable to the Boston Herald writers, rather than Micki, it necessarily follows that her statements are not "of and concerning" Scholz. However, a factual dispute exists whether the defamatory connotation of the article is attributable to Micki. If the jury attributes statements to Micki, the jury must also decide if those statements refer to Scholz or could reasonably be interpreted as referring to him.

Moreover, the record reveals a dispute whether Micki intended her statements in the March 16, 2007, article to be interpreted to refer to Scholz, or if she was negligent in making such statements. "The question is not so much who was aimed at, as who was hit." *New England Tractor–Trailer Training of Conn. Inc. v. Globe Newspaper Co., supra* at 478, 480 N.E.2d 1005, quoting from *Corrigan v. Bobbs–Merrill Co.,* 228 N.Y. 58, 63–64, 126 N.E. 260 (1920). In her statement of material facts, Micki stated, "Scholz is often referred to in the press as the 'mastermind' behind BOSTON." In her deposition, she stated, "[Scholz] is Boston." Moreover, two days prior to the article Micki told the publicist for BOSTON that she was "out to get [Scholz]" and that she was "f——ing sick of [Scholz]." And as mentioned previously, Micki knew that Brad's suicide would garner heavy media attention. She allegedly then made the disputed statements to Fee and Raposa. "While the plaintiff need not prove that the defendant 'aimed' at the plaintiff, he or she must prove that the defendant was negligent in writing or saying words which reasonably could be understood to 'hit' the plaintiff." *Ibid.* The backdrop of the March 16, 2007, article, along with Micki's alleged statements to Fee and Raposa, raise a reasonable question of fact whether her alleged statements intentionally refer to Scholz or whether she was negligent in making such statements in a way that could reasonably be construed as referring to Scholz.

3. *The defendant must be shown to be at fault for making the statement.* The final contested element that Scholz must prove is that Micki is at fault for making the allegedly defamatory statements.

Because Scholz is a public figure, see *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 342, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *DiBella v. Hopkins,* 403 F.3d 102, 110 (2d Cir.), cert. denied, 546 U.S. 939, 126 S.Ct. 428, 163 L.Ed.2d 326 (2005), he must show that the statement was "made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *LaChance v. Boston Herald,* 78 Mass.App.Ct. 910, 911, 942 N.E.2d 185 (2011), quoting from *New York Times Co. v. Sullivan,* 376 U.S. 254, 279–280, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). To determine whether the statement was made with malice, "[w]e must review ... the materials put before the judge to determine whether, 'considered with an indulgence in the plaintiff's favor,' they may demonstrate to a jury to a clear and convincing degree the presence of malice on [the defendant's] part." *King v. Globe Newspaper Co.,* 400 Mass. 705, 720, 512 N.E.2d 241 (1987), cert. denied, 485 U.S. 940, 108 S.Ct. 1121, 99 L.Ed.2d 281 (1988), quoting from *Godbout v. Cousens,* 396 Mass. at 258–259, 485 N.E.2d 940.

Here, the judge concluded that only one statement in the article ("the last straw ... that ultimately led to ... suicide") could reasonably be construed as showing that Micki spoke falsely or with reckless disregard for the truth. Nevertheless, the judge concluded that the existence of ill will between the parties was insufficient to satisfy the element of malice. However, the jury, in determining whether a plaintiff has met his burden of demonstrating malice, may consider evidence of hostility. See *McNamee v. Jenkins,* 52 Mass.App.Ct. 503, 507, 754 N.E.2d 740 (2001), quoting from *Tosti v. Ayik,* 394 Mass. 482, 492,

476 N.E.2d 928 (1985) ("In order to determine the defendant's state of mind, the jury are entitled to draw inferences from the objective evidence").

In addition, Scholz alleges that Micki was the source of the statements that formed the basis of the March 16, 2007, article. If Micki is found to have made the disputed statements, such a finding may be viewed as evidence that Micki knew that the statements were false, or that she made them with reckless disregard for the truth. See *Rotkiewicz v. Sadowsky,* 431 Mass. 748, 755, 730 N.E.2d 282 (2000) ("The inquiry is a subjective one as to the defendant's attitude toward the truth or falsity of the statement rather than the defendant's attitude toward the plaintiff"). See also *McNamee v. Jenkins, supra* at 506, 754 N.E.2d 740 (summary judgment is inappropriate in defamation cases where there are contested facts as to actual malice). Alternatively, the evidence may yield neither conclusion. From the record before us, we conclude that the judge's determination that Scholz could not prove the element of malice was error; in our view, such a determination should be left to the fact finder.

4. *Conclusion.* We have carefully considered the extensive summary judgment record. Viewing the evidence in the light most favorable to Scholz, we are satisfied that genuine issues of material fact exist as to each of the three elements that formed the basis for the judge's allowance of Micki's motion for summary judgment.

Appendix C

Superior Court of Massachusetts

Suffolk County

Donald Thomas SCHOLZ et al.[1]

v.

Micki DELP et al.[2]

Nos. SUCV201004069[3], SUCV201001010[4]

August 19, 2011

Before JOHN C. CRATSLEY, J.

These consolidated actions arise from articles published by the Boston Herald regarding the suicide of Brad Delp ("Brad"), the former lead singer of the band Boston. In the action that is the subject of this decision, Suffolk Civil Action No.2010–4069, the

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[1] The DTS Charitable Foundation, Inc.

[2] Connie Goudreau and Jane Doe.

[3] The case was originally filed in Middlesex Superior Court as Civil Action No.2007–3944.

[4] *Scholz v. Boston Herald, Inc., Gayle Fee, and Laura Raposa.*

plaintiff, Donald Thomas Scholz ("Scholz"), the founder of Boston, brought a claim for defamation against the defendant, Micki Delp ("Micki"), Brad's ex-wife, with respect to statements in one Boston Herald article that are attributed to Micki (Count I).[5] The plaintiffs claim that these statements indicate that Brad committed suicide because of turmoil in his professional life caused by Scholz. Now before this Court is Micki's Supplemental Motion for Summary Judgment. For the reasons discussed below, the motion is *ALLOWED*.

FACTUAL BACKGROUND

Brad Delp committed suicide on March 9, 2007. On March 16, 2007, the Boston Herald's Inside Track column published an article entitled: "Pal's snub made Delp do it: Boston rocker's ex-wife speaks; Delp's ex says 'No one can possibly understand.' " The article states, in relevant part:

> Boston lead singer Brad Delp was driven to despair after his longtime friend Fran

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[5] Scholz and The DTS Charitable Foundation, Inc. also brought a claim for tortious interference with advantageous relations against Micki (Count III). This claim was never fully briefed or argued, and the parties did not pursue discovery during the expanded period regarding any of the alleged conduct on which the claim is based. Thus, this Court deems the claim waived. In addition, the plaintiffs are not pressing their claim for civil conspiracy (Count IV) against Micki. Finally, the plaintiffs' claims against Connie Goudreau (Counts I, III, and IV) and Jane (Count II) Doe have been dismissed

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 pressure he was under," said Micki Delp, the mother of Delp's two kids, in an exclusive interview with the Track.

> Brad lived his life to please everyone else. He would go out of his way and hurt himself before he would hurt somebody else, and he was in such a predicament professionally that no matter what he did, a friend of his would be hurt. Rather than hurt anyone else, he would hurt himself. That's just the kind of guy he was.

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

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

"The decision to rehearse without the Cosmos was a group decision," Scholz said in a statement through his publicist.

"Brad never expressed unhappiness with that decision ... and took an active part in arranging the vocals for five people, not seven."

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

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

"Mr. Brad Delp. J'ai une ame solitaire. I am a lonely soul," said one of the notes. "I take complete and sole responsibility for my present situation." The note also included instructions on how to contact his fiancée, Pamela Sullivan, who found Delp's body.

"Unfortunately she is totally unaware of what I have done," the note said.

Yesterday Sullivan, who was planning to marry Delp this summer, said the situation was "extremely painful" for her, Delp's children and his family.

"To the rest of the world, this is a big story," she said. "But to Brad and Micki's children and me, it's very different."

According to police reports released yesterday, Delp was found on the floor of his bathroom on Friday, his head on a pillow and a note paper-clipped to the

> neck of his shirt. He died sometime between 11:30 p.m. March 8 and the next afternoon.
>
> 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."...

PROCEDURAL BACKGROUND

On April 23, 2010, Micki filed a Motion for Summary Judgment (Docket # 43). On September 21, 2010, Micki filed a Motion for Dismissal of Plaintiff's Complaint as a Sanction for his Willful Withholding

and Whiting–Out of Highly Material Discovery that Establishes her Right to Summary Judgment (Docket # 50). Micki also filed a Motion for Leave to File Supplemental Summary Judgment Papers, "[i]n the event that the Court does not dismiss Scholz' complaint in its entirety" (Docket # 53). On September 28, 2010, the parties filed a stipulation stating that Micki could file supplemental materials regarding her Motion for Summary Judgment and Scholz would have an opportunity to respond (Docket # 51). Thereafter, Micki filed a Supplemental Motion for Summary Judgment and Scholz responded.

After discovering more new evidence, the parties submitted additional papers. Specifically, on March 1, 2011, Scholz submitted a Supplemental Summary Judgment Memorandum Concerning Recent Evidence (Docket # 135). On March 24, 2011, Micki submitted a Memorandum in Further Support of her Motion for Summary Judgment (Docket # 159) along with a Second Supplemental Statement of Undisputed Material Facts (Docket # 160), an affidavit, and exhibits. On April 11, 2011, Scholz moved the court to strike Delp's Second Supplemental Statement of Undisputed Material Facts or allow it time to respond (Docket # 169). The court allowed Scholz time to respond and a Third Consolidated Statement of Facts concerning Micki Delp's Motion for Summary Judgment was filed.

On May 13, 2011, Scholz indicated that he had obtained "significant evidence that establishes, without any doubt, the true reason why Brad Delp committed suicide." On May 16, 2011, Scholz requested the court defer ruling on Micki's Motion for

Summary Judgment until Scholz could take the deposition of two "third-party witnesses" concerning the "significant evidence." The court allowed the motion and held a hearing on June 6, 2011 regarding whether it would consider additional evidence from the "third-party witnesses." The parties filed memoranda regarding whether the court should consider the new testimony (Docket # s 192 and 195).

DISCUSSION

Summary judgment shall be granted when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Mass.R.Civ.P. 56(c); *Cassesso v. Commissioner of Correction,* 390 Mass. 419, 422, 456 N.E.2d 1123 (1983); *Community Nat'l Bank v. Dawes,* 369 Mass. 550, 340 N.E.2d 877 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue. *Pederson v. Time, Inc.,* 404 Mass. 14, 16–17, 532 N.E.2d 1211 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of its case at trial. *Flesner v. Technical Communications Corp.,* 410 Mass. 805, 809, 575 N.E.2d 1107 (1991); *Kourouvacilis v. General Motors Corp.,* 410 Mass. 706, 716, 575 N.E.2d 734 (1991). Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond with evidence of specific facts establishing the existence of a genuine dispute. *Pederson,* 404 Mass. at 17, 532 N.E.2d 1211. When reviewing a

motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party, drawing all permissible inferences in his or her favor. *Douillard v. LMR, Inc.,* 433 Mass. 162, 163, 740 N.E.2d 618 (2001).

To withstand a motion for summary judgment for defamation, Scholz must demonstrate that (1) Micki made a false statement "of and concerning" Scholz to a third party; (2) the statement could damage Scholz's reputation in the community; (3) Micki was at fault for making the statement;[6] and (4) the statement caused Scholz economic loss or is actionable without proof of economic loss.[7] *Ravnikar v. Bogojavlensky,* 438 Mass. 627, 629–30, 782 N.E.2d 508 (2003); *Reilly v. Associated Press,* 59 Mass.App.Ct. 764, 769, 797 N.E.2d 1204 (2003).

Micki made the following statements to the Boston Herald:

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[6] The level of fault varies between negligence for statements concerning private persons and actual malice for statements concerning public figures. *Jones v. Taibbi,* 400 Mass. 786, 797, 512 N.E.2d 260 (1987).

[7] There are four types of statements that are actionable without proof of economic loss: (1) statements that constitute libel; (2) statements that charge the plaintiff with a crime; (3) statements that allege that the plaintiff has certain diseases; and (4) statements that may prejudice the plaintiff's profession or business. *Ravnikar v. Bogojavlensky,* 438 Mass. 627, 630, 782 N.E.2d 508 (2003).

(1) Shortly before his death, Brad was "upset" about his friend and bandmate, Fran Cosmo, being "disinvited" from Boston's tour;

(2) "Barry and Sib are family and the things that were said against them hurt" and "Boston to Brad was a job, and he did what he was told to do. But it got to the point where he just couldn't do it anymore";

(3) "No one can possibly understand the pressure [Brad] was under";

(4) "Brad lived his life to please everyone else. He would go out of his way and hurt himself before he would hurt somebody else, and he was in such a predicament professionally that no matter what he did, a friend of his would be hurt. Rather than hurt anyone else, he would hurt himself. That's just the kind of guy he was."

(5) 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; and

(6) Brad was upset over the lingering bad feelings from the ugly breakup of the band Boston over 20 years ago.[8]

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[8] Micki denies that she made the last two statements. For purposes of this summary judgment motion, however, the court, considering the facts in the light most favorable

Micki moves for summary judgment on the grounds that these statements are (1) non-actionable opinions, (2) not "of and concerning" Scholz, (3) not defamatory, and (4) not published with actual malice.

A. Defamatory Connotation

The first question this Court addresses is whether the statements are reasonably susceptible of a defamatory meaning. *Foley v. Lowell Sun Publishing Co.,* 404 Mass. 9, 11, 533 N.E.2d 196 (1989); *Ellis v. Safety Ins. Co.,* 41 Mass.App.Ct. 630, 635, 672 N.E.2d 979 (1996). If the answer to this question is "yes," then the ultimate issue of whether the article is defamatory is not for the court. *Phelan v. May Dep't. Stores Co.,* 443 Mass. 52, 56–57, 819 N.E.2d 550 (2004); see *Jones v. Taibbi,* 400 Mass. 786, 791–92, 512 N.E.2d 260 (1987) ("Where the communication is susceptible of both a defamatory and nondefamatory meaning, a question of fact exists for the jury"). If the answer is "no," however, the defamation claim should be dismissed. *Stanton v. Metro Corp.,* 438 F.3d 119, 125 (1st Cir.2006).

The test to determine whether a writing is susceptible to defamatory meaning asks "whether, in the circumstances, the writing discredits the plaintiff in the minds of any considerable and respectable class of the community." *Brauer v. Globe Newspaper Co.,* 351 Mass. 53, 55, 217 N.E.2d 736 (1966) (internal quotations omitted); see *Phelan,* 443 Mass. at 56, 819 N.E.2d 550, quoting *Stone v. Essex County*

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to Scholz as the non-moving party, assumes that Micki made the statements.

Newspapers, Inc., 367 Mass. 849, 853, 330 N.E.2d 161 (1975) ("A false statement that 'would tend to hold the plaintiff up to scorn, hatred, ridicule or contempt, in the minds of any considerable and respectable segment in the community,' would be considered defamatory"); *King v. Globe Newspaper Co.,* 400 Mass. 705, 718, 512 N.E.2d 241 (1987) (inferences which might be drawn from a statement can make it actionable); Restatement (Second) of Torts § 568 (1977). The court must interpret the statement reasonably and examine it "in its totality in the context in which it was uttered or published." *Foley,* 404 Mass. at 11, 533 N.E.2d 196.

I find that none of the statements of Micki Delp are reasonably susceptible of a defamatory meaning. While the article as a whole could be read by some to contain a defamatory meaning as to Scholz because of the possible leap or inference a reader might make that turmoil in Brad's professional life, possibly caused by Scholz, played a role in Brad's suicide, none of the statements attributed to Micki make that connection, either explicitly or implicitly. While Micki's statements speak to Brad's "dysfunctional professional life," including the exclusion of Fran Cosmo and the "ugly breakup of" Boston, it is the Boston Herald writers who create the connection to Scholz and the possible implication that Scholz was responsible for the "dysfunction" and thus, Brad's suicide. See *Eyal v. Helen Bdcst. Corp.,* 411 Mass. 426, 433–34, 583 N.E.2d 228 (1991) (even though reports in other media sources may have focused on the corporation, "the broader and more intensive commentary done by others on the story cannot serve to make the [defendants'] statement capable of a

defamatory meaning if the defendants' words themselves have no application to the corporation"). For example, the Herald article quotes Micki as saying that Brad was upset that Fran Cosmo had been disinvited from the tour and then quotes Scholz who denied any unhappiness on Brad's part because of the exclusion of Fran Cosmo. The Herald writers immediately follow Scholz's quote with "[n]onetheless," suggesting a possible connection between Scholz and Brad's suicide. And later in the Herald article, the writers state that Micki said that Brad was upset over the lingering bad feelings from the ugly breakup of Boston. The Herald writers, strictly on their own, explain that Brad continued to work with Scholz, but also worked with Barry Goodreau, Fran Sheehan, and Sib Hashian who had a fierce falling out with Scholz in the early '80s. Then the Herald writers add, again possibly seeking to create a connection between Scholz and Brad's suicide, "[a]s a result, [Brad] was constantly caught in the middle of the warring factions."

Thus, even assuming that the Boston Herald article actually discredited Scholz in the community, Micki's statements themselves contain no defamatory content as to Scholz as a matter of law. See *id.* ("Whether a corporation's standing in the community was actually diminished is not relevant if the [defendant's statement] did not falsely charge the *corporation itself* with some kind of impropriety") (emphasis in original).

While finding that Micki's statements as reported are not reasonably susceptible of a defamatory meaning as to Scholz is sufficient to grant summary

judgment for Micki, see *Stanton,* 438 F.3d at 125, this Court will address some of the other reasons why Scholz cannot survive summary judgment.

B. "Of and Concerning"

To be actionable, the statement of the defendant must be "of and concerning" the plaintiff. *Ellis,* 41 Mass.App.Ct. at 636, 672 N.E.2d 979, citing *Eyal,* 411 Mass. at 429, 583 N.E.2d 228. To show that a statement is "of and concerning" him, the plaintiff can show "either that the defendant intended its words to refer to the plaintiff and that they were so understood, *or* that the defendant's words reasonably could be interpreted to refer to the plaintiff and that the defendant was negligent in publishing them in such a way that they could be so understood." *New England Tractor–Trailer Training of Conn., Inc. v. Globe Newspaper Co.,* 395 Mass. 471, 483, 480 N.E.2d 1005 (1985) (emphasis in original); Restatement (Second) of Torts § 564 (1977) ("A defamatory communication is made concerning the person to whom its recipient correctly, or mistakenly but reasonably, understands that it was intended to refer"); *Brown v. Hearst Corp.,* 54 F.3d 21, 25 (1st Cir.1995) ("Defamation can occur by innuendo as well as by explicit assertion").

Just as all six of Micki's statements do not have defamatory content as to Scholz, I find that none of the statements are "of and concerning" Scholz. The statements of Micki do not refer to Scholz by name "or in such a manner as to be readily identifiable ..." *New England Tractor–Training of Conn., Inc.,* 395 Mass. at 480, 480 N.E.2d 1005. Compare *Driscoll v. Board of Trustees,* 70 Mass.App.Ct. 285, 298, 873 N.E.2d 1177 (2007) (statement was not "of and concerning" as

plaintiff was not mentioned by name in article) with *Rielly,* 59 Mass.App.Ct. at 777, 797 N.E.2d 1204 (statement was "of and concerning" plaintiff who was "only person identified in article"). As previously discussed, Micki's six statements are about Brad and his mental state at the time of his suicide. The Herald writers, for whatever reason, added Scholz's name and his quotes. So if there is any possibility that the article is "of and concerning" Scholz, it is the Herald writers' doing.

In addition, also previously discussed, there is no reasonable interpretation of any of Micki's statements which permits the inference that Micki was referring to Scholz. See *Ellis,* 41 Mass.App.Ct. at 637, 672 N.E.2d 979 (quotations and citation omitted) ("If the person is not referred to by name or in such a manner as to be readily identifiable from the descriptive matter in the publication, extrinsic facts must be alleged and proved showing that a third person other than the person libeled understood it to refer to him"). Rather, it is the article as a whole that allows for that possibility.

C. Actual Malice

Scholz concedes that he is a limited purpose public figure; thus, Scholz must show, by clear and convincing evidence, that Micki acted with actual malice, that is, that Micki made each statement with knowledge of its falsehood or with reckless disregard for whether it was false. See *New York Times v. Sullivan,* 376 U.S. 254, 279–80, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). To establish reckless disregard, the plaintiff must show "'that the defendant in fact entertained serious doubts as to the truth of his

publication,' but proceeded to publish anyway." *Lane v. MPG Newspapers,* 438 Mass. 476, 485, 781 N.E.2d 800 (2003), quoting *St. Amant v. Thompson,* 390 U.S. 727, 731, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968); see *Stone,* 367 Mass. at 868, 330 N.E.2d 161 (standard is subjective so such doubts have to be in fact entertained by defendant although finding can be drawn from inference based on objective evidence).

I find the record does not reveal any realistic way in which Scholz can show that Micki knew statements 1, 2, 3, 4, or 6 were false or entertained serious doubts about their truth. Scholz has not identified specific evidence in the summary judgment record which raises a dispute as to whether Micki subjectively knew or seriously doubted the truth of statements 1, 2, 3, 4, and 6.

Statement 5 is the only statement which Micki could possibly have made falsely or with reckless disregard of the truth. It is the only statement containing causal language ("... the last straw ... that ultimately led to ... suicide"). Scholz has not submitted sufficient evidence at this stage, however, indicating that she actually did speak falsely or with reckless disregard for the truth. All of the evidence submitted by Scholz on this issue goes toward establishing Micki's alleged hatred or dislike of Scholz. "In the context of defamation, [however,] the term 'actual malice' does not mean the defendant's dislike of, hatred of, or ill will toward, the plaintiff." *Rotkiewicz v. Sadowsky,* 431 Mass. 748, 752, 730 N.E.2d 282 (2000); see Restatement (Second) of Torts § 580A comment d ("The presence of ill will or animus has no more effect than to assist in the drawing of an

inference that the publisher knew that his statement was false or acted in reckless disregard of its falsity"). The absence of anything in the summary judgment record indicating that Micki actually lied or doubted the truth of statement 5 is telling. See *id.,* at 755, 730 N.E.2d 282 (2000) (inquiry is subjective one as to defendant's attitude toward truth or falsity of statement rather than defendant's attitude toward plaintiff). Gail Parenteau's affidavit about her conversations with Micki on March 14 and 15, 2007, while describing Micki's anger and hostility toward Scholz, including her wish to link Brad's suicide to his unhappiness with Scholz, does not reveal anything about the truthfulness of statement 5 to the Herald. Whether she spoke falsely to the Herald on March 15, 2007, in an intentional effort to blame Delp's suicide on Scholz remains pure speculation. Furthermore, for reasons already given, Scholz has not overcome his burden of showing that statement 5 was reasonably susceptible of a defamatory meaning or of and concerning Scholz.[9]

ORDER

For the foregoing reasons, it is hereby *ORDERED* that Micki Delp's Supplemental Motion for Summary Judgment is *ALLOWED*.

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[9] This Court does not need to address whether the statements are fact or opinion as it has granted summary judgment to Micki on three other grounds.

Appendix D

Superior Court of Massachusetts

Suffolk County

Donald Thomas SCHOLZ

v.

Boston HERALD, INC. et al.

No. SUCV201001010

March 29, 2013

Before FRANCES A. McINTYRE, J.

INTRODUCTION

This The Boston Herald, Inc. and its two longtime columnists, Gayle Fee and Laura Raposa, wrote and published three stories in 2007 regarding the suicide of Brad Delp, the lead singer of the band "Boston." Allegedly, the articles relied on information from Delp's ex-wife, Micki Delp, and various unnamed "insiders" and "friends." Donald Thomas Scholz, the founder of Boston, brought defamation claims against the defendants for these articles, claiming that the articles insinuated that Scholz caused Delp to commit suicide. The defendants now move for summary judgment. The defendants' Motion for Summary Judgment will be ALLOWED, based on the following

reasoning, which is offered at the outset without citation.

Suicide is a tragedy for many reasons, one being the lingering question of why? with which the survivors must grapple. No one ever knows what actually motivated the person—in that last tortured moment—to end his life. Here, the defendants published the opinions of others and insinuated their own as to why Brad Delp killed himself.

While such opinions may have abounded at the time, Delp's final mental state is truly unknowable; it can never be objectively verified. The law dictates that defamation will only lie against a media defendant where the falsity of an assertion can be proven. Despite the amassing of powerful evidence of Delp's mental state, the plaintiffs cannot prove or disprove the actual cause of his suicide. That secret went to the grave with him. Any views on the subject would necessarily be opinions.

Defamation redresses the publication of false facts. An opinion cannot be false; the free expression of opinion on any matter of public interest is constitutionally protected by the First Amendment. Therefore, the publication by these media defendants of their opinion about the cause of Delp's suicide is not vulnerable to a claim of defamation. For this reason, summary judgment is granted to the defendants on both counts.

FACTUAL BACKGROUND

The following undisputed facts are drawn from the summary judgment record, and are viewed in a light most favorable to the non-moving party.

Scholz, a rock musician, composer, record engineer, and record producer, is an M.I.T. graduate, who in 1975 or thereabouts, founded the rock music group "Boston." Scholz was the leader of the band and Brad Delp the lead singer. After CBS/Epic Records entered into a record contract with Scholz and Delp, Scholz hired Barry Goudreau, Sib Hashian, and Fran Sheehan in other roles. Around thirty years ago, there was a falling out between Scholz and the trio of Goudreau, Hashian, and Sheehan, with Delp allegedly endeavoring to maintain his ties to each side until his death. A singer named Fran Cosmo and his son joined the band; Brad was dependent on Cosmo's voice as back-up to his own.

In late 2006, Scholz informed Delp that Boston would be doing a summer tour and rehearsals were to begin on March 24, 2007. On February 28, 2007, Scholz advised Delp that the initial summer performances had been confirmed. Cosmo, the back-up singer to Delp, was to tour with the band but that invitation was later rescinded. On March 1, 2007, Scholz emailed Delp indicating the tour was not confirmed. On March 9, 2007, Delp committed suicide.

Delp had a long history of anxiety and depression. He had suffered stage fright before concert performances with Boston and RTZ, another band with whom he toured in the early 1990s. He was prescribed Xanax in 1991 but his depression persisted. In 1991, Delp's second wife, Micki Delp,

separated from him, ultimately divorcing him in 1996 because of his mental health issues.[1]

In 2000, Brad became romantically involved with Pam Sullivan. They became engaged on Christmas Day 2006, and set a wedding date for August 2007. Pam's younger sister, Meg Sullivan, lived in Brad's home.

Nine days before Brad's suicide, Meg discovered that he had taped a small camera to the ceiling of her bedroom. Thereafter, Brad sent emails to Meg and her boyfriend, Todd Winmill, voicing his sorrow over having "victimized" her. He wrote that he had "committed the most egregious sin against her." Meg was concerned that Brad was going to do something harmful to himself. Delp responded that "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, Delp told Pam about his invasion of Meg's privacy. Pam, too, feared that Delp would do something to harm himself.

On March 8, 2007, Delp purchased two charcoal grills that he employed on the following day to asphyxiate himself by carbon monoxide poisoning. He had also attached a dryer hose to his automobile as a "back up plan." Delp left a suicide note for Pam, for Meg and Winmill, for his two adult children, and for his ex-wife Micki. He also left two public notes. The Herald's "Inside Track" is a column written by defendants, Fee and Raposa, that covers

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[1] Family members are referred to by given names for the sake of clarity.

entertainment news. On March 15, 2007, the defendants wrote and published an article titled "Suicide Confirmed in Delp's Death." Fee has testified that the unnamed insiders mentioned in the article were Ernest Boch, Jr. and Paul Geary. On the same day, Fee appeared on WAAF radio. There, she stated that Scholz had given Delp nothing but "grief."

On or about March 15, 2007, the defendants spoke with Micki Delp. Shortly after the conversation between Micki Delp and the defendants, Fee sent an email to Scholz's publicist reporting what Micki Delp had told her—"she says Brad was in despair because Fran Cosmo was disinvited from the summer tour"—and asked her for a comment. Scholz responded that the firing of Fran Cosmo had been a group decision.

On March 16, 2007, the defendants wrote and published the second article, based on the conversation with Micki. According to testimony by Micki Delp in 2011, the statements attributed to her in quotes were accurate statements she gave the defendants.

The defendants wrote and published another article on July 2, 2007 relating to Delp's suicide.

The March 15, 2007 article, titled: "Suicide Confirmed in Delp's Death," stated in relevant part:

> Delp remained on good terms with both Tom Scholz, the M.I.T. 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 other guys were mad 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 March 16, 2007, the front-page headline of the *Boston Herald* read, "PAL'S SNUB MADE DELP DO IT" and in smaller print, "Boston Rocker's Ex–Wife Speaks." The article corresponding to the headline, in relevant part, states:

> 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 pressure he was under," said Micki Delp, the mother of Delp's two kids, in an exclusive interview with the Track.
>
> > Brad lived his life to please everybody 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 has 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 M.I.T.-educated engineer who founded the band back in 1976, the decision to drop Cosmo was not final and Delp was not upset about the matter. (Cosmo's son Anthony, however, was scratched from the tour.)

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

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

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

"Mr. Brad Delp. J'ai une solitaire. I am a lonely soul," said one of the notes. "I take complete and sole responsibility for my present situation." The note also included instructions on how to contact his fiancée, Pamela Sullivan, who found Delp's body.

"Unfortunately she is totally unaware of what I have done," the note said.

Yesterday Sullivan, who was planning to marry Delp this summer, said the situation was "extremely painful" for her, Delp's children and his family.

"To the rest of the world, this is a big story," she said. "But to Brad and Micki's children and me, it's very different."

According to police reports released yesterday, Delp was found on the floor of his bathroom on Friday, his head on a pillow and a note paper-clipped to the neck of his shirt. He died sometime between 11:30 p.m. March 8 and the next afternoon.

Sullivan told police that Delp "had been depressed for some time, feeling emotional and bad about himself," according to 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" ...

The July 2, 2007 article, titled, "Delp Tribute On," stated in relevant part:

> The concert will include one number—the encore—during which the original members of the band Boston will reunite. The parties founder Tom Scholz and the original members Barry Goudreau, Sib Hashian and Fran Sheehan with Fran Cosmo on vocals 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.

It is the gist of these statements that caused the plaintiff to file suit: the plaintiff believes these articles blame him for Delp's suicide.

DISCUSSION

Summary judgment shall be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Mass.R.Civ.P. 56(c). The moving party bears the burden of affirmatively demonstrating that there is no genuine issue of material fact on each relevant issue and that the summary judgment record shows the party is entitled to judgment as a matter of law. *Pederson v. Time, Inc.,* 404 Mass. 14, 16–17, 532

N.E.2d 1211 (1989). The moving party may satisfy this burden by demonstrating that the non-moving party has no reasonable expectation of proving an essential element of its case at trial. *Flesner v. Technical Comm'n Corp.,* 410 Mass. 805, 809, 575 N.E.2d 1107 (1991); *Kourouvacilis v. General Motors Corp.,* 410 Mass. 706, 710, 575 N.E.2d 734 (1991). "If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact." *Pederson,* 404 Mass. at 17, 532 N.E.2d 1211. The court views the evidence in the light most favorable to the nonmoving party. *Beal v. Board of Selectmen of Hingham,* 419 Mass. 535, 539, 646 N.E.2d 131 (1995).

The defendants present several arguments in support of their Motion for Summary Judgment. They claim that Scholz is precluded from bringing this action by collateral estoppel. Scholz first proceeded against Micki Delp; that lawsuit was consolidated with the present matter. Another judge of this court granted summary judgment to Micki Delp on the grounds that the statements were not "of and concerning" Scholz, the statements were not reasonably susceptible of a defamatory meaning against Scholz, and there was no clear and convincing evidence that the statements were made by Micki Delp with any doubt as to their truth.* The defendants argue that Scholz is collaterally estopped from pressing this claim as a matter of law.

Scholz counters by claiming that Judge Cratsley's ruling was limited to Micki Delp's statements, and not those contributed by the defendants. Scholz claims

that if this court were to look at the articles as a whole, including headlines, then a jury could conclude that the articles were of and concerning Scholz and could be read to have a defamatory impact.

Also, the defendants claim that summary judgment is appropriate under the five Constitutionally-based tests that they propose.[2]

First, the defendants claim that Scholz cannot meet the burden of establishing that the statements were of and concerning Scholz, because he was not mentioned by name, and no reasonable reader could interpret that the statements were about him. Scholz counters by alleging that not only could a reasonable person make the interpretation that the statements were of and concerning Scholz, but readers did in fact, make the interpretation based on the statements and the articles taken as a whole.

The defendants next claim that Scholz cannot pass the second mandated test: that the statement can be reasonably construed as defamatory to Scholz. The defendants argue that the article provides substantially correct facts and leaves it to the reader to draw his or her own conclusions. Scholz counters by claiming that, taking the articles as a whole, a reader could interpret them as implications that Scholz caused Brad Delp's suicide. Scholz further

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[2] The defendants cite no one case for their five Constitutionally-based factors. However, this court recognizes their five factors as correct propositions of First Amendment law applicable to defamation cases against media defendants.

alleges that because the communication is susceptible of defamatory and non-defamatory meaning, a question of fact has arisen, and as such summary judgment does not lie. Next, the defendants allege that, even assuming the first two tests are decided adversely to them, the statements were not objectively verifiable, meaning they are incapable of being proven false, and therefore are protected by the Constitution as they are opinions. Scholz counters by claiming that the statements were opinions based on false facts which are not protected. Scholz claims that the Herald attributed the statement to Delp's family and friends giving the impression that the articles were based on fact. Also, Scholz argues that all of the attributed statements, were in fact, false.

Further, defendants claim the plaintiff cannot prove that the Herald published these three articles with a high degree of awareness at the time that they were false. Plaintiff responds claiming evidence that these articles were written with actual malice or a reckless disregard of the truth.

Finally, the defendants allege that summary judgment should be granted as Scholz has no reasonable expectation of proving his claim for intentional infliction of emotional distress as all of his symptoms of distress were caused by conditions he suffered from well before the publication of any of the articles. Scholz counters by claiming that the symptoms were reactivated by the publication of the articles and it is, therefore, a question to be decided by the jury.

I. COLLATERAL ESTOPPEL

The defendants point out that Scholz consolidated his claim against Micki Delp (for defamation) with his claim against the defendants by arguing that both claims "squarely involve the same facts and issues of law." When the court (Cratsley, J.) granted summary judgment by ruling that Micki Delp's statements published in the *Herald* were non-actionable, Scholz was estopped by issue preclusion, they argue.

In order to establish issue preclusion, the defendants must show that the issue of fact sought to be foreclosed was actually litigated in a prior action and determined by a final judgment, and that determination was essential to the judgment. *Tuper v. North Adams Ambulance Service, Inc.,* 428 Mass. 132, 697 N.E.2d 983 (1988). A judgment is final for purposes of issue preclusion, regardless of the fact that it is on appeal. *O'Brien v. Hanover Ins. Co.,* 427 Mass. 194, 692 N.E.2d 39 (1998).

The court (Cratsley, J.) ruled that the six quoted statements made by Micki Delp were non-actionable; these all appeared in the March 16 article. Thus, the plaintiff correctly points out that Judge Cratsley rendered no decision regarding the March 15, 2007 nor the July 2, 2007 articles. In addition, the decision rendered regarding the statements in the March 16, 2007 article was limited to the statements attributed to Micki Delp, not the entire article. The court observed that "[w]hile the article as a whole could be read by some to contain a defamatory meaning as to Scholz because of the possible leap or inference a reader might make that turmoil in Brad's professional life possibly caused by Scholz, played a role in Brad's suicide, none of the statements

attributed to Micki make that connection, either explicitly or implicitly."

This court must now determine whether all three of the articles published by the defendants are defamatory. Examination of the entirety was not required in the litigation between the plaintiff and Micki because that issue was limited to whether any of the six statements attributed to her were defamatory. Here, the analysis requires this court to examine each article as a whole, all the words used, including headlines. *Foley v. Lowell Sun Pub. Co.,* 404 Mass. 9, 11, 533 N.E.2d 196 (1989).

Because that issue was not litigated in the companion action, there is no preclusive effect in the present action. *Treglia v. MacDonald,* 430 Mass. 237, 241, 717 N.E.2d 249 (1999).

II. DEFAMATION

To withstand a motion for summary judgment for defamation, Scholz must demonstrate that (1) the defendants made a false and defamatory statement "of and concerning" Scholz to a third party; (2) the statement could damage Scholz's reputation in the community; (3) the defendants were at fault for making the statement; and (4) the statement caused Scholz economic loss or is actionable without proof of economic loss. *Ravnikar v. Bogojavlensky,* 438 Mass. 627–30, 782 N.E.2d 508 (2003). A statement on matters of public concern must be provable as false where a media defendant is involved. *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 19–20, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990).

A. Defamatory Connotation

The threshold inquiry is whether the statements are reasonably susceptible of a defamatory meaning and that determination is a question of law for the court. *Foley v. Lowell Sun Pub. Co.,* 404 Mass. 9, 11, 533 N.E.2d 196 (1989). A statement is defamatory when, "whether in the circumstances, the writing discredits the plaintiff in the minds of any considerable and respectable class of the community." *Brauer v. Globe Newspaper Co.,* 351 Mass. 53, 55, 217 N.E.2d 736 (1966). The statement must be one that "would tend to hold the plaintiff up to scorn, hatred, ridicule, or contempt, in the minds of any considerable and respectable segment in the community." *Stone v. Essex County Newspapers, Inc.,* 367 Mass. 849, 853, 330 N.E.2d 161 (1975). Certainly, had the defendants explicitly stated that the plaintiff caused Brad to commit suicide, the plaintiff would survive summary judgment. However, a searching examination of all three articles reveals no such statement. Instead, the plaintiff asks this court to look at the articles as a whole and see within them the implication that the plaintiff was responsible for Delp's suicide.

A defamation claim may stand when inferences which might be drawn from a statement tend to discredit the plaintiff in the minds of the community. *King v. Globe Newspaper Co.,* 400 Mass. 705, 718, 512 N.E.2d 241 (1987). The court looks at the statement in "its totality in the context in which it was uttered or published." *Foley,* 404 Mass. at 11, 533 N.E.2d 196. This requires the court to examine all the words used and the headlines. *Id.* There is no support in *Foley,* however, for the proposition that this court must mass all three articles together as a single statement. That would not reflect the experience of the

readership; each edition of the newspaper is a stand-alone proposition. Therefore, this court will examine each, in its totality, to determine whether any or all of the articles are defamatory.

The defendants are correct in that articles which are merely undesirable, or unhelpful to the band's image, are not actionable. But taking the facts in the light most favorable to the plaintiff, Scholz alleges that others read the statements in all three articles as insinuations that the plaintiff caused Delp to commit suicide. "[D]efamation can occur by innuendo as well as explicit assertion." *Reilly v. Associated Press,* 59 Mass.App.Ct. 764, 774, 797 N.E.2d 1204 (2003).

The March 15, 2007 article led with the facts provided by police, and quoted the family's statement. In part, they had said Brad Delp "gave as long as he could, as best he could, and he was very tired." The article then quoted unnamed friends who said his "constant need to help and please people ... may have driven him to despair." This was followed by the declarative statement: "He was literally the man in the middle of the bitter breakup of Boston-pulled from both sides by divided loyalties." This was followed by two short paragraphs detailing his man-in-the-middle situation. Another insider was then quoted: "Tom made him do the Boston stuff and the other guys were mad that they weren't part of it ... He was always under a lot of pressure."

Without explicitly so stating, the defendants used Delp's conflicted Boston relationships to fill in the ellipses in the family's statement. Thus, they, in effect, suggested that Brad Delp had given to his

friends on both sides of the Boston divide "as long as he could, as best he could, and he was very tired." The implication was clear; the Inside Track thought Delp was exhausted by his efforts to please his bandmates.

Then the article turned to Scholz: his "penchant for perfection and his well-chronicled control issues"; "too much to endure"; and "ugliness flared again" when Scholz displaced the Goudreau–Hashian group at a benefit. Four paragraphs of negative commentary about Scholz were followed by: "the wounds remained so raw that Scholz wasn't invited to the private funeral service for Delp." While not explicit, the implication that Scholz was the cause of Delp's suicide was inescapable due to artful placement of information. The placement suggested a nexus and causation.

Similarly, the March 16, 2007 article begins by attributing to Micki Delp the statement that her ex-husband was "driven to despair" when his back-up singer Fran Cosmo was dropped from Boston. He would, she is quoted as saying, "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." Scholz's publicist is next quoted in denial of the "disinvitation" but the following sentence discredits the denial: "Nonetheless ... Delp said he had "lost [his] desire to live." The article then rehashes the facts from the police report and the middleman status of Delp according to his ex-wife, Micki. Moving toward the conclusion, the article quotes Micki again: "Boston to Brad was a job, and he did what he was told to do. But it got to the point that he just couldn't do it anymore."

The understandable effort by Micki to explain her ex-husband's suicide did not place blame on Scholz. But by clever tying of these pieces of information together in the same article, the Herald and its writers implied that Scholz's dropping of Cosmo drove Delp to despair, to the point where he could not do his job anymore, and to where he would hurt himself. This is all pre-figured by the headline: "Pal's Snub made Delp do it: Boston Rocker's ex-wife speaks." In totality, the article and headline would warrant a reasonable person's inference that the plaintiff was responsible for the act which "caused" in whole or in part Delp's suicide.

The July 2, 2007 article is brief. It reported that "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." While the conflictual history of the group is not recounted, those in the music community would have been warranted in identifying the plaintiff as the cause of the bitterness and the situation which led to Delp's suicide. This article is the first which expressly sets forth Boston as the reason for Delp to take his own life. It pointedly summarizes the March 15 and 16 articles, and proves the defamatory innuendo of all three.

For the above stated reasons, this court finds that all three articles contain statements reasonably susceptible of a defamatory meaning.

B. "Of and Concerning" the Plaintiff

The next issue is whether the statement referred to the plaintiff or could be reasonably read in the

context as pertaining to the plaintiff. *Godbout v. Cousens,* 396 Mass. 254, 264, 485 N.E.2d 940 (1985) (determining whether the article refers to the plaintiff is a question of fact which may be evaluated in light of the facts and circumstances attending publication). There are two alternative tests to determine whether a statement is "of and concerning" the plaintiff: one subjective and one objective. *Eyal v. Helen Broadcasting Corp.,* 411 Mass. 426, 430–31, 583 N.E.2d 228 (1991). The subjective test inquires as to whether the defendants intended the statements to refer to the plaintiff. *Id.* at 430, 583 N.E.2d 228. The objective test inquires as to whether the statement could reasonably be understood to refer to the plaintiff. *Id.*

In the present matter, whether the statements in any of the three articles were "of and concerning" the plaintiff must be left to the jury. A defamation plaintiff must prove that the defendant's words are "of and concerning" the plaintiff. To do so, the plaintiff must prove either that the defendant intended their words to refer to the plaintiff and that they were so understood, or that the defendant's words reasonably could be interpreted to refer to the plaintiff and that the defendant was negligent in publishing them in such a way that they could be so understood. *New England Tractor–Trailer Training of Connecticut, Inc. v. Globe Newspaper Co.,* 395 Mass. 471, 483, 480 N.E.2d 1005 (1985).

As observed in the discussion on defamatory connotation, Tom Scholz was named in the articles, along with others, but only his personal history as leader of the band was woven through the suicidal

mental state of Brad Delp. A reasonable person could determine that the articles were of and concerning Scholz. Plaintiff has raised genuine issues of material fact which preclude the entry of summary judgment on this element.

C. Whether the Defamatory Connotation Is One of Fact or of Non–Actionable Opinion

"Statements of fact may expose their authors or publishers to liability for defamation, but statements of pure opinion cannot. Statements of pure opinion are constitutionally protected." *King v. Globe Newspaper Co.,* 400 Mass. 705, 708, 512 N.E.2d 241 (1987). In determining whether a challenged statement is fact or privileged opinion, a question of law is presented if reasonable people could not decide the matter differently, while a jury question is posed if the statement could reasonably be understood either way. *King* at 709, 512 N.E.2d 241. "In deciding whether statements can be reasonably understood as fact or opinion 'the test to be applied ... requires that the court examine the statement in its totality in the context in which it was uttered or published. The court must consider all the words used, not merely a particular phrase or sentence. In addition, the court must give weight to cautionary terms used by the person publishing the statement, including the medium by which the statement is disseminated and the audience to which it is published.' " *Driscoll v. Board of Trustees of Milton Academy,* 70 Mass.App.Ct. 285, 297, 873 N.E.2d 1177 (2007), quoting *Cole v. Westinghouse Bdcst. Co.,* 386 Mass. 303, 309, 435 N.E.2d 1021 (1982).

Pure opinions are those based on disclosed or assumed non-defamatory facts, and are not actionable at law. *National Ass'n of Government Emp., Inc. v. Central Broadcasting Corp.,* 379 Mass. 220, 226, 396 N.E.2d 996 (1979) (holding that the defendant's statements that the plaintiff was a "communist" and was infringing on the right to free speech was an opinion based on disclosed facts, and therefore was not actionable). The libel sought to be addressed in plaintiff's complaint is that "the public has now been left with the false understanding that Mr. Scholz drove Mr. Delp to such despair that he committed suicide on March 9, 2007." As plaintiff sees it: "Herald conveys that Scholz was Responsible for Brad's Suicide," see Plaintiff's Memorandum of Law in Support of Opposition to Motion for Summary Judgment at 8.1.

The plaintiff challenges the headline: "Pal's Snub made Delp do it: Boston Rocker's ex-wife speaks," and the implicit assertion (Scholz was responsible) within the March 16 article. The primary question is whether the words themselves taken in their natural sense and without a forced or strained construction can be understood as stating a fact. *Myers v. Boston Magazine Co., Inc.,* 380 Mass. 336, 341, 403 N.E.2d 376 (1980). The test for that is whether the challenged language can reasonably be read as stating a fact. *Id.* at 340, 403 N.E.2d 376.

This court concludes that no reasonable reader would understand that the insinuation running through all three articles that the plaintiff was responsible for Brad Delp's suicide was an assertion of fact. Any reader would reasonably take this

assertion to be an opinion on the mental state of a now-deceased person. As noted above, suicide is a tragedy for many reasons, one being the lingering question of "why?" with which the survivors must grapple. This is a common human understanding. No one ever knows what actually motivated the person to end his life. Considering the context of the article, presented as insider information ("gossip" if you will) about entertainment celebrities, it would only be reasonably perceived as an opinion held by a person or persons with some familiarity with the situation. No other interpretation is reasonable.

Another means of distinguishing fact from opinion statements is whether the defamatory statements are capable of being proven true or false, objectively and verifiably. Statements which cannot be proven false cannot be characterized as assertions of fact. *Cole v. Westinghouse Broadcasting Co., Inc.,* 386 Mass. 303, 312, 435 N.E.2d 1021 (1982). "Only statements that are provably false are actionable." *Veilleux v. Nat'l Broad. Co.* 206 F.3d 92 108 (1st Cir.2000).

In this court's view, it would be impossible for plaintiff to disprove the proposition that Scholz caused Delp to take his own life, as he would be required to do in order to establish the falsity of the proposition.

Brad Delp was the only source of information as to his true motivation at the moment he ignited the two charcoal grills; he is no longer available. He may well have been motivated by his own shame and humiliation because of his invasion of Meg's privacy and he may well have been depressed about the bitter

band breakup, his relationship with Scholz, or the pressure of singing without Cosmo. Anyone other than the deceased is capable only of harboring an opinion as to whether any of these reasons were the whole or partial grounds for his suicide. But because no one will ever know the dead man's final mental state, it is only an opinion.

The plaintiff brushes aside this position by pointing out that mental states are proven every day in criminal courtrooms across the Commonwealth. He does so on the basis of dicta in a defamation case. "A given state of mind is a fact that can be proved like any other and, indeed, is proved in every criminal prosecution." *Tech Plus, Inc. v. Ansel,* 59 Mass.App.Ct. 12, 22–23, 793 N.E.2d 1256 (2003). The quote is inapposite.

In a criminal case, twelve jurors must unanimously agree whether the Commonwealth has proved a specific intent (to kill, to rob, to maim) beyond a reasonable doubt, often based on circumstantial evidence. In a discrimination case, it must be shown that the defendant held a discriminatory animus. Each of the jurors must form an opinion as to the existence of a mental state in the defendant based on the evidence; for a conviction, that opinion must be unanimous and held to a moral certainty. It cannot be gainsaid that the jurors, too, are capable only of opinions.

Here, the plaintiff is obligated to factually disprove a mental state, not satisfy a jury that a mental state existed. Scholz is compelled to prove that Delp was actually and factually *not* motivated—at all—by concerns for which Scholz was responsible. In

other words, Scholz must disprove Delp's mental state vis-a-vis Scholz.

Statements on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved. *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 19–20, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990).[3] It will not be enough to bring the jurors to an opinion as to what caused Delp to take his own life; that won't be a question put to the jury. Instead, the plaintiff is obligated to factually prove that Scholz was not in Delp's mind at all at the fatal moment. It is not that it is a difficult proposition to disprove that is controlling; it is that it is an impossible proposition to disprove. The proposition is not objectively verifiable.

Plaintiff counters that, if this is an opinion, it is a "mixed" opinion. Mixed opinions are those based on facts which have not been disclosed or assumed to exist, and may be defamatory if they can be reasonably understood to be based on undisclosed defamatory facts. Restatement, 2d, Torts § 556, Comment c. The defendant has not raised a jury issue that the articles rested on undisclosed defamatory

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[3] The court recognizes that Delp's suicide was a private tragedy. However, he had become an entertainment celebrity, a public figure for the purpose of the band Boston, and his death was a matter of public interest. His family prepared a public statement in this regard. While not an issue of public safety or the public fisc, for the public who cared about him during his life, his death was an issue of public concern.

facts. The bases of the inference were fully disclosed. Indeed, the bases of the inference constituted the articles.

The statements made by Micki Delp were fully disclosed in the March 16, 2007 article. Those statements have been endorsed by her. This judge agrees with the ruling of the previous court (Cratsley, J.) that considered the case and deems Micki Delp's statements non-defamatory on the same reasoning. Moreover, everything that Micki Delp said was her opinion of her ex-husband's situation based on conversation and observation. Disclosure of the opinions of Micki and others as the basis of the opinion/inference provided by the Herald gave the reader the opportunity to make up his own mind in assessing whether the defendants' published statement offered a valid opinion as to the cause of Delp's suicide.

The March 15, 2007 article attributed the information regarding the band's breakup to an unnamed source. Those statements of "friends" and "insiders" standing alone, solely regard the mental state of Delp and are not "of and concerning" Scholz. Again, these are opinions. "The meaning of these statements is imprecise and open to speculation." *Cole v. Westinghouse Broadcasting Co., Inc.,* 386 Mass. 303, 312, 435 N.E.2d 1021 (1982). Equipped with these disclosed non-defamatory statements, a reader could discern for himself whether Delp's connection to the band was the true source of the mental state described in the family's statement ("he was very tired") and was, or was not, the cause of Delp's suicide. See *Driscoll,* 70 Mass.App.Ct. at 297, 873

N.E.2d 1177 (holding that the school's statement that a sexual situation involving five boys and one girl was based on pressure and coercion, was not defamatory because it was based on disclosed nondefamatory facts).

Moreover, despite the plaintiff's argument that these opinions were falsely attributed, this court is persuaded that there is no genuine dispute that the statements of Micki and insider/friends were actually made, and are still endorsed by them. That those individuals' beliefs about Brad Delp's mental state were opinions based on their conversations with him or observations is well-established by the factual record of the case, as to which there is no genuine dispute.[4]

Gacek v. Owens & Minor Distrib., Inc., 666 F.3d 1142 (8th Cir .2012), is directly on point. In *Gacek,* the plaintiff alleged defamation when the defendant told other employees that the plaintiff "pushed [the decedent] over the edge, and was the straw that broke the camel's back and that was the reason for [the decedent's suicide]." *Id.* at 1147. However, the court found that none of those statements expressed

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[4] The plaintiff denies that Micki Delp made the statements attributed to her. This judge has ferreted through the plaintiff's opposing statements in the record to examine the source of that denial. This court has reviewed the 2008 deposition of Micki Delp and finds she disclaimed only two sentences in which her comments were paraphrased. Plaintiff has no reasonable expectation of now proving that Micki Delp did not make the statements that she says she made, and stands by.

"objectively verifiable facts" about the suicide's decision process. *Gacek* at 1147–48. Rather, they express another's "theory" or "surmise" as to the suicide's motives in taking his own life. *Id.* "[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).

There is no actionable claim of defamation because the plaintiff has no reasonable expectation of proving the statements were false, and they constitute non-actionable opinion. Thus, the court need not reach the remaining elements, including malice and reckless disregard.

III. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The claim of intentional infliction of emotional distress is entirely derivative of the central claim of defamation as it is based on the same articles. Therefore, summary judgment must be allowed on this claim; it has no separate footing. *LaChance v. Boston Herald,* 78 Mass.App.Ct. 910, 910, 942 N.E.2d 185 (2011). The claim will be discussed briefly.

In order to prevail on a claim for intentional infliction of emotional distress, a plaintiff must show (1) that the defendant intended to cause or should have known that his conduct would cause, emotional distress; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's conduct caused the plaintiff's distress; and (4) the plaintiff suffered severe distress. *Casy v. Marcella,* 49 Mass.App.Ct. 334, 340, 729 N.E.2d 1125 (2000), quoting *Sena v. Commonwealth,* 417 Mass. 250, 263–64, 629 N.E.2d

986 (1994). Assuming arguendo that the plaintiff could prove that the defendants intended to cause the plaintiff emotional distress, summary judgment for the defendant would still be warranted as the plaintiff could not prove the extreme and outrageous element. To satisfy that element, the plaintiff must show that the defendants' conduct was "beyond all possible bounds of decency and of a nature that no reasonable person could be expected to endure it." *Howell v. Enterprise Publishing Co.,* 455 Mass. 641, 672, 920 N.E.2d 1 (2010). Where this court has ruled that the statements published by the defendants were not defamatory, it cannot be inferred that the publication of such statements is extreme and outrageous.

Moreover, even assuming the extreme and outrageous element was satisfied, the plaintiff has no reasonable expectation of proving causation or damages. The plaintiff has suffered from a variety of ailments since before March 2007. It is the symptoms of these same ailments that the plaintiff alleges was caused by the defendants. *Caputo v. Boston Edison Co.,* 924 F.2d 11, 14 (1st Cir.1991) (affirming summary judgment on IIED claim where plaintiff's depression pre-dated the defendant's actions). Because the plaintiff's ailments are identical to ailments he had prior to the publication of the articles, the plaintiff has no reasonable expectation of proving that the publication caused them.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby ORDERED that the defendants' Motion for Summary Judgment be ALLOWED. Judgment is to enter for the defendants on both counts.

Appendix E

Suicide Confirmed in Delp's death

Boston Herald

By Gayle Fee and Laura Raposa

Thursday March 15, 2007 – Updated: 01:29 AM EST

Brad Delp lit two charcoal grills in the bathroom adjacent to his master bedroom and committed suicide via asphyxiation last week, according to New Hampshire police who yesterday confirmed that the lead singer of the band Boston took his own life.

"He was a man who gave all he had to give to everyone around him, whether family, friends, fans or strangers," the singer's family said in a statement. "He gave as long as he could, as best he could, and he was very tired. We take comfort in knowing that he is now, at last, at peace."

Delp, 55, a Danvers native, left two sealed suicide notes taped to a door and letters to his family and his fiancée, Pamela Sullivan. But Atkinson, N.H., Police Lt. William Baldwin said the cops were not told why he took his life. Toxicology tests by the state medical examiner's office showed that Delp died of carbon monoxide poisoning.

"It's very sad for all of us who loved this guy," said ex-Extreme drummer Paul Geary, a close friend of Delp and his family. "Whenever I called him for anything he'd drop everything and help, and whenever he called me it was for someone else."

Friends said it was Delp's constant need to help and please people that may have driven him to despair. He was literally the man in the middle of the bitter break-up of Boston - pulled from both sides by divided loyalties.

Delp remained on good terms with both Tom Scholz, the MIT grad who founded the band, and Barry Goudreau, Fran Sheehan and Sib Hashian, former members of Boston who had a fierce falling out with Scholz in the early '80s.

Delp tried to please both sides by continuing to contribute his vocals to Scholz' 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."

As you may know, in 1976 the band's first album, featuring Scholz, Delp, Goudreau, Hashian and Sheehan, was the best-selling debut album in history, spawning rock staples "More Than a Feeling," 'Peace of Mind,' "Foreplay/ Long Time" and 'Rock and Roll Band.' But shortly thereafter things deteriorated.

Scholz' penchant for perfection and his well-chronicled control issues led to long delays between albums. As a result, Goudreau, Delp and Hashian released an album without him, which led to an irretrievable breakdown.

Scholz claimed that the other band members - with the exception of Delp - attempted to steal the

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

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

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

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

In an interview with Rolling Stone after Delp's death, Scholz said he and Delp were "friends and collaborators for 35 years but our bond ran much deeper than just Boston."

But Scholz also made reference to the ongoing feud in the interview when he told the rock bible that "unlike other individuals eventually involved with Boston, Brad's down-to-earth personality never wavered."

Police discovered Delp's body in his southern New Hampshire home at around 1:30 p.m. last Friday. Sullivan had gone to the house after failing to reach her fiance by phone. Police said Delp was alone at the time of his death.

Some friends expressed surprise at the timing of Delp's suicide. He had been planning to tour with Boston and to marry Sullivan this coming summer. He was also content working with his first love - a Beatles tribute band called Beatlejuice. But friends say there was a dark side.

"He was a sad character to begin with," said one close pal. "He didn't think highly of himself. He was always very self-deprecating. He's always been that way, though, so there was really nothing to lead anyone to believe that he would do this."

Delp leaves two children, Jennifer, 26, and John Michael, 22.

Tomorrow, the classic rock station WZLX will pay tribute to Delp with a special edition of "Classic Cafe" featuring his music. The show, hosted by Carter Alan, begins at noon.

Appendix F

Pal's snub made Delp do it: Boston rocker's ex-wife speaks

Boston Herald

By Gayle Fee and Laura Raposa

Friday, March 16, 2007 - Updated: 07:59 AM EST

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

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

"Brad lived his life to please everyone else. He would go out of his way and hurt himself before he would hurt somebody else, and he was in such a predicament professionally that no matter what he did, a friend of his would be hurt. Rather than hurt anyone else, he would hurt himself. That's just the kind of guy he was."

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

But according to Tom Scholz, the MIT-educated engineer who founded the band back in 1976, the decision to drop Cosmo was not final and Delp was not

upset about the matter. (Cosmo's son Anthony, however, was scratched from the tour.)

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

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

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

"Mr. Brad Delp. J'ai une ame solitaire. I am a lonely soul," said one of the notes. "I take complete and sole responsibility for my present situation." The note also included instructions on how to contact his fiancee, Pamela Sullivan, who found Delp's body.

"Unfortunately she is totally unaware of what I have done," the note said.

Yesterday Sullivan, who was planning to marry Delp this summer, said the situation was "extremely painful" for her, Delp's children and his family.

"To the rest of the world, this is a big story," she said. "But to Brad and Micki's children and me, it's very different."

According to police reports released yesterday, Delp was found on the floor of his bathroom Friday, his head on a pillow and a note paper-clipped to the neck of his shirt. He died sometime between 11:30 p.m. March 8 and the next afternoon.

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."

Considerate to the end, Delp left a note on the top of the stairs at his home warning rescuers that there was carbon monoxide in the house. Another note said the couple's cat, Floppy, should be in a room that was safe from the deadly gas and asked that someone find her and make sure she was all right.

Police said Delp was so intent on ending it all that he had a backup plan if the charcoal fumes didn't kill him. A dryer vent tube was connected to the exhaust pipe of Delp's car. In the garage, police found a note taped to the door leading into the house.

"To whoever finds this I have hopefully committed suicide. Plan B was to asphyxiate myself in my car."

Outside the bathroom, police found a carbon monoxide detector with the battery removed.

Delp joined Boston in the mid-1970s and sang two of its biggest hits, "More than a Feeling" and "Long Time." A lifelong Beatles fan, Delp also played with the tribute band Beatlejuice.

Delp was cremated Wednesday, police said. A private funeral was held earlier this week.

Appendix G

Delp tribute on

Boston Herald

By Inside Track

Monday, July 2, 2007 – Updated 06:51 AM EST

Word is, that despite what you read elsewhere, the Brad Delp tribute concert is a go and tickets will likely go on sale tomorrow.

Credit music manager and ex-Extreme drummer Paul Geary for bringing all the warring factions together. The concert will include one number – the encore – during which the original members of the band Boston will reunite. The parties – founder Tom Shotz and original members like Barry Goodreau, Sib Hashlan and Fran Sheenhan with Fran Cosmo on vocals – 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.

Delp's two kids came up with the idea for a "Coming Together" in his honor Aug. 19 at the Bank of America Pavilion.

Appendix H

Court documents spotlight singer's feelings about Scholz

Boston Herald

By Joe Dwinell

Monday, May 14, 2012

A distressed Brad Delp, lead singer of the rock band Boston, told his close friends that band leader Tom Scholz was a "bully" who made him feel like "an abused dog," and that Delp was trying to summon the courage to "stand up" to Scholz and quit the band in the months before he took his life, according to summaries of pretrial testimony recently made public.

Delp committed suicide in March 2007 at age 55 shortly after being informed by Scholz that the band was going to be touring that summer, and just before rehearsals for the tour were about to begin.

Scholz has sued the Herald, alleging that in its reporting on Delp's suicide in 2007, the Herald defamed him by implying that Scholz was responsible for Delp's decision to take his life. Scholz also claims that the Herald's articles caused him emotional distress. The Herald denies that it blamed Scholz for Delp's decision to commit suicide, and states that it accurately reported the opinions expressed to it by Delp's friends, family and acquaintances about the pressures that Delp said he was feeling near the end of his life.

According to the testimony of Delp's close friends and former bandmates, Delp told them in the months leading up to his suicide that he was "terrified" of being sued by Scholz and that he desperately wanted to quit Boston for good but was afraid that if he did Scholz, who had been involved in litigation with numerous people associated with the band, would sue him.

Court records indicate that Delp's doctor has testified that in late January 2007, about six weeks before Delp took his life, Delp came to see him complaining of heart palpitations and shortness of breath, and told him that the band and Scholz were increasing his anxiety, and that he was thinking of quitting the band.

Friends testified that Delp told them that he felt like a "wimp" for not being able to confront Scholz and that Scholz had financially mistreated him by taking band revenue and using it as his own "expenses." According to a summary of pretrial testimony, Delp told his former wife that Scholz was "a man who believed his own lies," and that he could not speak to Scholz.

Scholz sued Delp's former wife, Micki Delp, claiming she defamed him in statements made to the Herald after Delp died. A superior court judge has dismissed those claims.

A former band member, Fran Sheehan, testified that Scholz had admitted to "screwing" Delp out of credit for Boston's most famous song, "More Than A Feeling," for which Delp had written the title and refrain, according to Sheehan, and that Scholz had

instead given Delp credit for another, less lucrative song.

Scholz asserts that he and Delp were "best friends," and notes that Delp had quit Boston in the past and that Scholz had never sued him. He denies financially mistreating Delp and asserts that Delp was free to quit the band if he wished to.

Scholz has pointed to a personally embarrassing incident that occurred between Delp and a close friend in late February 2007, as one that greatly upset Delp and asserts that that is the reason Delp took his life.

According to the summary of testimony on file, Delp had already begun purchasing the items that he used to take his life the day before the incident.

Court records reflect that in 2004, on Boston's last tour before Delp took his life, Delp was deeply depressed at being with the band and told close friends that he wanted out of Boston and wished that Scholz "would just quit." According to one former band member, Delp said on that tour that one way for him to get out of the band would be to commit suicide. The band member testified that he asked Delp if he were serious, and that Delp had looked at him, said that he was, and just "walked away."

The summary of pretrial testimony had been compiled by the Herald's lawyers. Scholz's lawyers took the step of filing the summary with Superior Court Judge Frances A. McIntyre in connection with their emergency motion to strike it as too long. McIntyre denied the motion. Scholz has not yet

responded to the Herald's summary, and has 60 days to do so.

Appendix I

Delp friends open up in testimony about Delp-Scholz relationship

Boston Herald

By Joe Dwinell

Wednesday, May 23, 2012

When Fran Sheehan joined the rock band Boston in the 1970s, lead singer Brad Delp took him aside and confided that he feared what band founder Tom Scholz would do to the band members. "I have a feeling," Brad warned the young bass player, "that he's going to destroy us all and take us all down in the end."

According to testimony, which was summarized by Herald lawyers in court papers in the litigation filed by Tom Scholz against the Herald, what followed were several years in which Scholz "berated" and "belittled" the four other original band members almost nightly. According to the filings, Scholz screamed at Delp for not being able to hit the high notes and yelled at him on one occasion in front of the others: "If you ever, ever hit another high note like that, I will take that microphone from you and I will throw it in the crowd. They sing better than you do."

By 2006, Sheehan and two other original members, Barry Goudreau and Sib Hashian, had been gone from the band for 20 years, and the only original members left were Scholz and Delp. Brad told his closest friends that he wanted badly to quit the

band, but was afraid if he did, Scholz would "make life miserable for him."

At a Christmas party at Goudreau's house in December, 2006, less than three months before Delp took his life, Sheehan asked Brad a question: If Boston ever was nominated to the Rock and Roll Hall of Fame, would Brad go to Scholz and ask him if the original band members, with whom Scholz had been engaged in bitter feuds, could take part in the induction ceremony?

Delp said, "I can't," Sheehan recalled in his pretrial testimony in the defamation lawsuit brought by Scholz against the Herald, according to court documents. "I said, Brad, why not? He said, Fran, I've come to the conclusion that I'm a wimp. I can't stand up to him anymore."

Sheehan was one of about 20 of Delp's old friends and former bandmates who testified regarding what Brad told them about his fear of and inability to confront Scholz and about their personal opinions of what drove the depressed and anxiety-prone Delp to decide in March 2007 that he no longer wanted to live, according to papers recently filed in Suffolk Superior Court.

According to former Boston member David Sikes, Delp "didn't like Tom. He didn't trust Tom. He felt that Tom had taken advantage of him financially, especially." In Delp's last conversation with Sikes not long before Delp's suicide, Delp told Sikes "how much he envied me, that I had the guts to stand up to Tom Scholz and the guts to quit the band and to move on with my life, to leave Boston."

Also shortly before Delp took his life, he told his lifelong friend Steve Frary that Scholz "was driving him crazy," and used an expletive to describe Scholz, the only time that Frary heard Delp swear in the 35 years he had known him.

On March 16, 2007, one week after Delp's suicide, Goudreau wrote to Scholz directly, telling him: "Tom, I don't even know where to begin. I can't explain the pain and suffering you have caused me and my family, Brad and his family ... Tom, you abused Brad ... We could not keep it under wraps forever."

Court documents reflect that Delp's friends were asked their opinion of what had caused Delp to take his life, based on their knowledge of him and his conversations with them. Bill Faulkner, whom Delp had asked to preside over his upcoming wedding, testified that in his view "the root cause of his death was uncontrolled depression, but the contributing factor would certainly include in a big way Tom Scholz."

Delp's old friend Joy Baker testified that in her opinion, "Brad just could not stand one more minute of feeling like he could not stand up for himself or do the right thing, if you will, in any aspect of his life, because he was so afraid of — you know, he would run from confrontation and I think he was just beaten down by the years of dealing with Tom Scholz."

Scholz has sued the Herald, claiming that in its 2007 articles about Delp's suicide the Herald blamed Scholz for Delp's death. The Herald denies that it has blamed Scholz for Delp's decision to take his life.

In the case, Scholz has argued that an extremely upsetting and embarrassing incident that occurred between Delp and a close friend on Feb. 28, 2007, was what drove Delp to take his life. However, the summary of testimony filed in court indicates that in late January 2007, six weeks before the incident, Delp visited his doctor and told the doctor that he was suffering increased anxiety because of Boston and Scholz, and was thinking of quitting the band.

The summary also indicates that on Feb. 27, 2007, the day before the incident, Delp had already made two separate trips to purchase items that he apparently used 10 days later in connection with his decision to take his life. According to police reports, Delp used duct tape to seal the bathroom where he asphyxiated himself with charcoal grills. Police also found a carbon monoxide monitor nearby which could track the levels of carbon monoxide and which required Energizer or Duracell 9 volt batteries.

Court records indicate that on Feb. 27, Delp purchased duct tape and a package of Duracell 9 volt batteries at about 2 p.m.. Then, at about 9:40 p.m. Feb. 27, according to court records, Delp went out and purchased a package of Energizer 9 volt batteries.

Scholz asserts that he "had a very strong personal connection" with Delp and was his friend for more than 30 years. In his litigation against the Herald, Scholz has claimed that the newspaper falsely asserted that Delp committed suicide "because of turmoil and extreme stress from his professional life caused by Scholz."

Scholz has until June 30 to respond to the summary of testimony compiled by the Herald's lawyers and submit his own evidence to the court.