No. 15-1103

IN THE

Supreme Court of the United States

DONALD THOMAS SCHOLZ, ET AL.,

Petitioners,

v.

MICKI DELP, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Massachusetts Supreme Judicial Court

RESPONDENT BOSTON HERALD'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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March 30, 2016

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QUESTIONS PRESENTED

1. Whether there are "compelling reasons" justifying review of the Massachusetts Supreme Judicial Court's decision holding that articles allegedly "implying" that Petitioner Scholz was "to blame" for the thought process that led a decedent to decide to take his life constituted no more than non-actionable opinion where the Supreme Judicial Court, applying well-settled rules of law repeatedly affirmed by this Court, concluded that such an "implication" was not reasonably interpreted as an assertion of fact and would not be provable as false.

2. Whether there are "compelling reasons" justifying review of that decision where it was based on a rule of law which, while also embraced by this Court, has been found by Massachusetts courts to be wholly independent of federal constitutional law and grounded in Massachusetts common law and Article 16 of the Massachusetts Declaration of Rights.

3. Whether "compelling reasons" justifying review exist where (1) there is no conflict whatsoever, let alone a "deep and abiding" one, presented by the Supreme Judicial Court's decision; and (2) there are only two cases in which courts have been asked to decide whether assertions of blame for a suicide constituted non-actionable opinion, one of which was this one, and both held that the alleged assertions were non-actionable.

4. Whether "compelling reasons" justifying review of the decision exist where (1) Petitioners point to only six cases in the history of American jurisprudence in which defamation claims have been brought arising in any way from a suicide and, therefore, this is not at all

a case that is "particularly likely" to recur; and (2) both the trial court's decision granting summary judgment to the Boston Herald and the Supreme Judicial Court's decision affirming it were based on a voluminous factual record that included the specific statements, the specific factual context in which they appear, and undisputed testimony from those closest to the decedent about what he had told them in the weeks and months before he took his life.

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, the Boston Herald, Inc. states that it has no parent corporation, and no publicly-held corporation owns more than 10% of its stock.

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SUMMARY OF RESPONDENT BOSTON HERALD'S BRIEF IN OPPOSITION

Pursuant to United States Supreme Court Rule 15, the Boston Herald, Gayle Fee and Laura Raposa (collectively, "the Herald") hereby oppose the petition for a writ of certiorari of Donald Thomas Scholz ("Scholz") and another (collectively, "Petitioners") seeking review of the decision of the Massachusetts Supreme Judicial Court ("SJC") in *Scholz v. Delp*, 41 N.E.3d 38 (Mass. 2015) (Appendix of Respondent Boston Herald, hereinafter "Herald App.," at 1a-23a). The SJC affirmed the decision granting summary judgment by the Massachusetts Superior Court ("Superior Court") in *Scholz v. Boston Herald, Inc.*, 2013 Mass. Super. LEXIS 83 (Mass. Super. Ct. March 27, 2013) (Herald App. at 23a-49a). The Superior Court rejected Scholz' claims that the Herald was liable to him for defamation and, derivatively, for intentional infliction of emotional distress arising from articles published in the Boston Herald in 2007. Scholz, the founder of the rock band Boston, claimed that articles written about the suicide of the band's lead singer, Brad Delp ("Delp" or "Brad"), "insinuated" that Scholz was "to blame" for Delp's decision to take his own life.

The SJC held that, even assuming *arguendo* that the statements in the Herald articles could reasonably be interpreted as "blaming" Scholz for Delp's decision to commit suicide, such an insinuation (1) was not provably false on the record of undisputed facts that formed the basis for the Superior Court's decision; (2) could not reasonably be interpreted as an assertion of fact given the statements, the articles, and the factual context; and (3) at most set forth opinion which fully disclosed the non-defamatory facts on which it was

based, without implying the existence of undisclosed defamatory facts. The SJC's decision was entirely consistent with, and mandated by, this Court's rulings in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *Letter Carriers v. Austin*, 418 U.S. 264 (1974); and *Greenbelt Coop. Publishing Ass'n, Inc. v. Bresler*, 398 U.S. 6 (1970). The SJC's decision was also mandated by a long line of precedent based on Massachusetts common law and the Massachusetts Declaration of Rights. *See Lyons v. Globe Newspaper Co.*, 612 N.E.2d 1158, 1165 (Mass. 1993) (requiring judgment for media defendant on independent state grounds).

Scholz' petition should be denied for six separate reasons.

First, contrary to the Petitioners' assertion, the SJC did not create a "categorical presumption exempting from defamation actions statements about a person's suicide," *see* Petition for Writ of Certiorari of Donald Thomas Scholz (hereinafter, "Pet. Br.") at 2. Rather, it applied this Court's well-established precedent, as well as fully consistent rules of law grounded in Massachusetts common law and the Massachusetts Declaration of Rights. It did not create or endorse any "presumption," "categorical" or otherwise. Nor did it create or endorse any "exemption." Indeed, it expressly applied the rules of law set forth by this Court, including those set forth and reaffirmed in *Milkovich*.

Second, contrary to the Petitioners' assertion, the SJC in no way "deepen[ed] a significant conflict among many state and federal courts as to whether statements about the cause of a particular suicide . . . are categorically exempt from claims of defamation." Pet. Br. at 2. Petitioners point to *no case* holding that such

statements are presumed to be exempt from defamation claims, categorically or otherwise. They identify only two cases in the history of American jurisprudence that even address the issue in *Scholz*: whether statements that purportedly imply that another is to blame for a suicide can reasonably be interpreted as an assertion of fact. Both of those courts held on the basis of the facts before them that they could not — and one of those courts was the SJC in *Scholz*. There is, therefore, no "significant conflict" deepened by the SJC's decision, far less the "deep and abiding conflict among courts" that Petitioners represent exists.

Third, far from "depart[ing] from this Court's core holding in *Milkovich* . . . that there is no need to create a special First Amendment privilege for statements that can be labeled opinion," Pet. Br. at 2, the SJC expressly embraced that holding. *Scholz*, 41 N.E.3d at 47 ("We recognize that there is no 'wholesale exemption for anything that might be labeled opinion'" (quoting *Milkovich*, 497 U.S. at 18)). The *Scholz* court merely applied the rules of law set forth in numerous decisions of this Court, including *Hepps*, *Letter Carriers* and *Bresler*, that were expressly affirmed in *Milkovich*. *See Scholz*, 41 N.E.3d at 47.

Fourth, in addition to applying this Court's authority, the SJC applied Massachusetts authority holding that opinions that did not imply the existence of undisclosed defamatory facts are also not actionable under Massachusetts common law and Article 16 of the Massachusetts Declaration of Rights. *Lyons v. Globe Newspaper Co.*, 612 N.E.2d 1158, 1165 (Mass. 1993) ("[T]he independent protections of freedom of speech which are found in our common law and in art. 16 would lead us to reach the same result even if there existed no Federal constitutional support for the

principles which we applied."). Accordingly, even if this Court were to view the SJC's decision as somehow at variance with its own rulings, the decision would fully stand on independent state law grounds. *See Jankovich v. Indiana Toll Road Comm'n*, 379 U.S. 487, 489 (1965) (dismissing writ of certiorari as improvidently granted where state court's judgment was supported by an independent and adequate state law ground); *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945) ("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal law, our review would amount to nothing more than an advisory opinion.").

Fifth, notwithstanding Petitioners' assertions that this Court should grant review because of the "[i]mportance of the [q]uestion [p]resented" and "because of the great importance of limiting false statements about the cause of suicide" and that the case presents a fact pattern which is "particularly likely" to recur, Pet. Br. at 35, a review of the very cases Petitioners cite reflects that the issue presented here virtually never arises. Other than the SJC's decision in *Scholz*, Petitioners cite only one other case, *Gacek v. Owens & Minor Distrib. Inc.*, 666 F.3d 1142 (8th Cir. 2012), which presents the issue of whether alleged accusations of blame for a suicide are reasonably interpreted as assertions of fact or are provably false. Both *Scholz* and *Gacek* answered the question in the negative, doing so on the factual records before them.

Petitioners point to only four other defamation cases in the history of our jurisprudence even arising from the issue of suicide. Two of them do not even involve a claim that plaintiff was responsible for a suicide. *See*

Tatum v. Dallas Morning News, No. 05-14-01077-CV, 2015 Tex. App. LEXIS 13067, at *39-41 (Tex. App. December 30, 2015) (addressing whether newspaper column's implication that parents were dishonest and deceptive regarding son's suicide was non-actionable opinion and concluding that statements accusing parents of deception, *not* of causing son's suicide, were actionable);[1] *see also Yohe v. Nugent*, 321 F.3d 35, 41 (1st Cir. 2003) (affirming summary judgment in favor of defendants in part because statement that plaintiff-arrestee "was suicidal" was non-actionable opinion based on disclosed non-defamatory facts). The other two, based on Pennsylvania law, simply held that such statements could reasonably be viewed as *defamatory*, and did not address the issue of whether such statements would be *non-actionable opinion*. *See MacRae v. Afro-American Co.*, 172 F. Supp. 184 (E.D. Pa. 1959), *aff'd* 274 F.2d 287 (3d Cir. 1960); *Rutt v. Bethlehems' Globe Publ'g Co.*, 484 A.2d 72, 77 (Pa. Super. Ct. 1984).[2]

In short, while suicide *itself* is of course an important issue, *see* Pet. Br. at 35-38, Petitioners are able to point to only six defamation cases in history that relate in any way to suicide, and to only two that present the issue decided by the SJC: one is the SJC's decision in *Scholz*, and the other, *Gacek*, is precisely in accord with the SJC's decision and its analysis was expressly adopted by the SJC in *Scholz*. This hardly supports Petitioners' claim that the SJC's decision in

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[1] *Tatum* was a decision of an intermediate appellate court, not a court of last resort.

[2] *MacCrae* was decided long before this Court's decisions in *Bresler*, *Letter Carriers*, *Hepps* and *Milkovich*. *Rutt*, decided before *Hepps* and *Milkovich*, was not a decision of a state court of last resort.

Scholz was based on a fact pattern that is "particularly likely" to recur.

Finally, the Superior Court's decision granting summary judgment, and the SJC's decision affirming it, were based on a highly specific record containing over 7,000 pages of evidence reflecting the particular factual context in which the statements in the articles were made. It also contained uncontroverted testimony confirming that the Herald had quoted its sources correctly and had described their views accurately, and that those individuals' views were based on what Delp himself had told them.

STATEMENT OF THE CASE

Scholz, the public figure founder of a rock band, was unable either at the summary judgment stage before the Superior Court or before the SJC to identify a single actual false statement of fact that defamed him in any of the Herald articles that formed the basis of this lawsuit. Scholz nevertheless maintained that the articles, which were about the suicide of the band's lead singer, Delp, "implied" that Scholz was "to blame" for Delp's decision to end his life. Scholz claimed that in reporting the views expressed by Delp's former wife, Micki Delp (hereinafter, "Micki"), about Delp's state of mind before he died, the Herald "insinuated" that Scholz was at fault for Delp's thought process leading to his suicide. Micki did not mention Scholz in her comments to the Herald and the Herald did not state that she mentioned Scholz.

The Superior Court had before it on summary judgment a voluminous factual record that included thousands of pages of transcripts from depositions of several dozen individuals with whom Delp had spoken about his mental state in the last weeks and months

of his life, including Micki, his fiancée, his high school friends, his bandmates, his former bandmates and even his doctor. The Superior Court "ferreted through" that extensive record. *Scholz*, 2013 Mass. Super. LEXIS 83, at *32 n.4, Herald App. at 47a. As the SJC observed, "[i]t is evident from the decision on the Herald's motion for summary judgment that the judge relied extensively on the deposition record[.]" *Scholz*, 41 N.E.3d at 48.

The Superior Court found on the basis of its review of that record that there was no genuine dispute that the Herald had both quoted Micki accurately and that it had reported her views accurately, as Micki confirmed. It likewise found that there was also no genuine factual dispute that the Herald had accurately quoted others and accurately reported *their* views, as those individuals confirmed. Indeed, it found that there was no genuine dispute that these views were based on what Delp had himself told these individuals, as well as many others:

> [D]espite the plaintiff's argument that these opinions [of the individuals quoted or whose views were described] were falsely attributed, this court is persuaded 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 were 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.

Scholz, 2013 Mass. Super. LEXIS 83, at *32.

The Superior Court held that, assuming *arguendo* that the Herald articles implied that Scholz was at

fault for the thought process that led to Delp's decision to take his life, such an implication would be non-actionable opinion. It did so by applying rules of law long-established by this Court (and by Massachusetts courts applying those rules), and by applying Massachusetts authority grounded in the common law and Article 16 of the Massachusetts Declaration of Rights. It applied the rule articulated in *Hepps*, and reaffirmed in *Milkovich*, that statements on matters of public concern must be provable as false in order to be actionable at least where a media defendant is concerned. *Scholz*, 2013 Mass. Super. LEXIS 83, at *29, Herald App. at 44a-45a. In that regard, Scholz had stipulated at oral argument that in order to prevail at trial he would be required to prove that neither he nor the band Boston was in Delp's mind at all when he decided to take his life. *See* Herald App. at 122a; *see also Scholz*, 2013 Mass. Super. LEXIS 83, at *29, Herald App. at 44a. As the Superior Court stated: "[That] proposition is not objectively verifiable." *Scholz*, 2013 Mass. Super. LEXIS 83, at *30.

The Superior Court also applied the SJC's holding in *King v. Globe Newspaper Co.*, 512 N.E.2d 241, 243-44 (Mass. 1987), that a statement is not actionable if it could not be reasonably interpreted as one of fact, and used the factors developed by Massachusetts courts to analyze the statements here. Massachusetts courts have held for a third of a century that:

> [T]he test to be applied . . . requires that this 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.

Scholz, 2013 Mass. Super. LEXIS 83, at *25, Herald App. at 41a (quoting *Cole v. Westinghouse Broad. Corp.*, 435 N.E.2d 1021, 1025 (Mass. 1982)). Based on its review of the factual record, the Superior Court concluded that no reasonable reader would believe that the Herald was asserting as fact that Scholz was responsible for Delp's suicide: "Any reader would reasonably take this assertion to be an opinion on the mental state of a now-deceased person." *Id.* at *27.

Finally, the Superior Court also relied on the rule that any such opinion that was "based on disclosed or assumed non-defamatory facts" is not actionable. *Id.* at *25, Herald App. at 42a (citing *Nat'l Ass'n of Gov't Emps., Inc. v. Cent. Broad. Corp.*, 396 N.E.2d 996, 1000-01 (Mass. 1979)). This is a rule of law which, as the SJC has stated, is rooted in Massachusetts common law and Article 16 of the Massachusetts Declaration of Rights and exists independently of the First Amendment. *See Lyons*, 612 N.E.2d at 1165.

Because the Superior Court held that the articles' alleged insinuation that Scholz was to blame for Delp's decision to take his life constituted non-actionable opinion under several different analyses, it did not need to reach certain of the other grounds for summary judgment urged by the Herald. For example, where the Superior Court expressly found that the Herald accurately reported the views that Micki and Delp's other friends had indisputably conveyed to the Herald, and where those views were based on conversations with Delp, Scholz had no reasonable

expectation of demonstrating that the Herald published those views with the required high degree of awareness of their probable falsity — let alone of doing so by the constitutionally-required "clear and convincing evidence." *HipSaver, Inc. v. Kiel*, 984 N.E.2d 755, 769 (Mass. 2013) (plaintiff could not satisfy "actual malice" standard even where information that formed basis of publisher's interpretation in article was allegedly flawed); *Lane v. MPG Newspapers*, 781 N.E.2d 800, 807-08 (Mass. 2003) (affirming summary judgment where plaintiff could not sustain burden of demonstrating "by convincing clarity" that defendants knew the complained-of article was false or acted with reckless disregard for its truth or falsity); *Milgroom v. News Group Bos., Inc.*, 586 N.E.2d 985, 987 (Mass. 1992) (similar); *see also St. Amant v. Thompson*, 390 U.S. 727, 730 (1968) (reversing judgment for plaintiff where evidence that reporter had no personal knowledge of plaintiff's activities and relied on affidavit from someone of whose credibility he had no knowledge "fell short of proving St. Amant's reckless disregard for the accuracy of his statements about Thompson").

STATEMENT OF THE FACTS

The summary judgment record contained the following undisputed facts.

Delp, the longtime lead singer of the band Boston, took his life on March 9, 2007, shortly before the start of a Boston tour. He told numerous close friends that he was "distraught" about the tour, and that he was "terrified" to tell Scholz. Scholz had scheduled rehearsals to begin on March 24, 2007. On February 28, 2007, Scholz informed Delp that summer performances had been confirmed. On March 7, 2007, Scholz'

tour manager called Delp to confirm arrangements for the tour. Less than 36 hours later, Delp took his own life. A592, 693-704, 745, 831-837, 839-842, 909-912.[3]

Delp identified the abuse he had suffered as a child as the cause of his lost "ability to speak up for himself." The lead singer in a band whose songs were extremely high and "very painful on his voice," Scholz had screamed at Delp about not being able to hit the notes "properly." Scholz would scream: "If you ever, ever hit another note like that, I will take that microphone from you and I will throw it in the crowd. They sing better than you." Delp "would hang his head and would be visibly upset by it, but didn't want to speak." For the rest of his life, Delp told his wife and closest friends that "he was afraid to speak back to Tom." Scholz' treatment of the original members of Boston — Delp, Barry Goudreau, Sib Hashian, and Fran Sheehan — led them to refer to themselves out of Scholz' earshot as "The Browbeats." The poor relations between Scholz and the others led to lawsuits and the acrimonious departure of Goudreau, Hashian and Sheehan, all close friends of Delp.[4]

Scholz, an MIT graduate, had early on presented Delp, a high school graduate, with a document which Delp signed relinquishing any interest he held in the name "Boston." This deprived Delp of any rights in or to Boston. Delp had told others that he was unhappy about how Scholz had "punished" his friends, that he felt "humiliated" for not having stood up to Scholz and that he was, in his view, a "wimp" for never being able

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[3] References to the record before the SJC are cited herein as "A___."

[4] A45 at ¶14, 601-602, 604, 606-08, 612, 618, 622, 625-654, 706, 708, 725-727, 731, 733, 734, 740, 767, 821, 837-838, 880.

to confront Scholz. A591, 623-624, 627-628, 632-633, 654-692, 807-821, 824, 831-833.

Delp also told his friends that Scholz had mistreated him financially, including by paying himself large sums of money out of band revenues as "expenses," thereby reducing Delp's income. When a federal judge ruled that Scholz had acted dishonestly in paying himself hundreds of thousands of dollars in order to avoid paying royalties, Delp told his wife that he was afraid to speak to Scholz about it because Scholz was "a man who believes his own lies." A660-667, 673, 711-713, 717-721.

Delp told friends that "he hated being in Boston. He hated that he still had to do it. He said he was embarrassed to be associated with Boston." Delp suffered panic attacks and related seizures while touring with Boston, anxious "that he wasn't going to do a good job and that [] wouldn't be received well either from the crowd or from Tom…[because] Tom had berated him previously and yelled at him." He told others that "he didn't like Tom. He didn't trust Tom. He felt that Tom had taken advantage of him financially, especially." When one member quit Boston, Delp "expressed his envy of me for having the guts to stand up to Tom . . . [a]nd to leave the band, to quit the band. And he expressed that he wished that he was 'not such a wimp' and was able to do the same thing."[5]

Delp expressed "a constant fear" that Scholz would sue him as he had sued others, telling friends that he was "terrified" of Scholz, that Scholz was a "bully" and an "asshole" and that "he was afraid that if he decided

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[5] A609-610, 655-658, 673-677, 679-684, 688-705, 761, 774, 783-784, 831-839, 866-867, 897, 903, 1074.

not to tour, Tom would come down hard on him." Indeed, on January 6, 2007, just two months before he took his life, Delp emailed Scholz about the upcoming tour, telling him he wanted to talk but assuring him "nothing confrontational. I generally avoid confrontations of any kind like the plague." A693-712, 705, 715, 848-849.

On Boston's last tour before Delp's suicide, Delp told his friends "he wished [Boston] would just end…I wish Tom would just quit." One band member stated:

> Brad came on to the tour bus after one performance . . . [a]nd he says, "I just . . . want to go home. I'd like the tour to end, and I just don't want to do this no more," and I says "Well, Brad, why didn't you tell Tom…Just go talk to him and explain to him how you would like to get out or whatever – or whatever your feelings are to leave Boston…" He says, "I can't."

Delp spoke constantly about quitting, saying that one way was to commit suicide.

> [I]t was one occasion when we were talking about, you know, when he would quit…[H]e goes "I can always just kill myself." He goes, "I can always just kill myself."
>
> I go, "Brad, what are you talking about? You know, don't joke around with me like that." He looked at me with that eye directly. "No, I'm serious," and he walked away.

A781-786, 791.

It had become increasingly difficult and painful for Delp to sing Boston's very taxing, high notes as he grew older. Delp had long relied on his bandmate Fran

Cosmo to help him sing in concerts, and freely talked about his dependence on Cosmo singing many of the high notes. He told Cosmo during the last tour that he simply "couldn't do it without him." Delp told one friend shortly before he took his life "that he was really upset that Tom had fired [Cosmo] because [he was] his lifeline [be]cause Brad could not hit the high notes anymore and [Cosmo] could." A723-733, 737, 740, 749-758.

In late 2006, Scholz informed Delp that he had fired Cosmo from Boston, and that Boston would go on tour in 2007. Delp told friends "This was going to be it. He was finally going to stop being such a wimp, in his words, and stand up to Tom."

> He would say that he felt like a beat-up dog that had no dignity left and still hung around with his abuser.
>
> . . .
>
> Those were his exact words. He felt that Tom had berated him so badly that he couldn't leave — that he couldn't leave his abusive owner. He had been beaten into submission.

A609-611, 737, 831, 835-836.

Delp told Micki and numerous others that he was "distraught" and "despondent" about the firing of Cosmo. He told one friend that "[h]e didn't know how he was going to do it for a whole concert tour. He didn't know what he was going to do."

> He was horrified…He said he didn't want to do it. He didn't want to work with Tom. He was too old to be singing those songs. He just didn't want to do it.

A731-745, 841, 859, 1002.

Also in the fall of 2006, Scholz intervened to block Delp from performing together with Goudreau and Hashian at a charity event. Delp told Micki and over a dozen of his close friends how upset he was at what Scholz had done, that it was *his* (i.e., Delp's) fault for not standing up for his friends, that he was extremely upset at Scholz for what he had done to them and at himself for permitting it.

> Brad told me he felt horrible about it. He said he was so embarrassed. He said that he should have been able to stand up and tell Tom 'I've been doing it with these guys for many years. I should be singing with them and not Boston. I should be singing with them.'

An email written by Delp in November 2006 confirms Delp's feelings about this. A801-821, 5270.

On January 22, 2007, Delp went to his doctor, presenting with heart palpitations and shortness of breath. He told his doctor "they were getting ready to go on tour" and

> that he was having a lot of stress from the band. He actually mentioned to me that he was considering leaving the band. He told me that he was having a lot of stress, that a great deal of it had to do with the band, and that he was contemplating quitting the band. He – the only name that he mentioned to me specifically was Tom Scholz.

A888-893.

On February 1, 2007, a friend found Delp more visibly despondent than he had ever seen him about Boston and the upcoming tour. On February 20, 2007,

Delp told Micki how unhappy he was about the tour. On February 27, 2007, Delp purchased the duct tape and the batteries for a carbon monoxide monitor that were found at his suicide scene. On February 28, 2007, Delp called Micki for the last time and told her what she should do "if anything happened to him" on the upcoming tour. A600, 841-842, 901-903, 1120-1122.

Delp's suicide attracted widespread publicity. In researching the article she wrote for the Herald's March 15, 2007 edition, reporter Gayle Fee interviewed a variety of individuals who were close to Delp, including Delp's former manager Paul Geary, and Ernie Boch, Jr., who was close friends with Goudreau and Hashian. Both Geary and Boch confirmed that they had spoken to Fee, that they were accurately quoted, and that the Herald accurately conveyed either their views or the views of Delp's friends and family. A912-928, 929-937, 938-951, 971-973, 3100-3123.

The March 15 article, entitled "Suicide confirmed in Delp's death," contained no statements that Scholz was the reason for Delp's decision to take his life. On the contrary, it stated:

- "the cops *were not told why [Delp] took his life*"
- "Friends said it was Delp's constant need to help and please people that *may have* driven him to despair."
- "Delp *remained on good terms with both* Tom Scholz . . . and Goudreau, Fran Sheehan, and Sib Hashian, former members of Boston who had a fierce falling out with Scholz in the early '80's."

- "But the never-ending bitterness *may have* been too much for the *sensitive* singer to endure."
- "Some friends expressed *surprise* at the timing of Delp's suicide. *He had been planning a tour with Boston… 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*.'"

A363-364 (emphasis supplied).

On March 15, Micki decided that she wanted to speak to the Herald about what Delp had been feeling. In response to Fee's questions, Micki made the statements that she is quoted as saying in the March 16 article. None of them mentioned Scholz:

(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. 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 [Delp] 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."

A975-982, 993-998.

Micki confirmed that every quote attributed to her was accurate. She confirmed that, although she did not use the "precise words" that had been used by the Herald in its lead and elsewhere, *without quotations,* to *paraphrase* Micki, the Herald's paraphrasing of what she said was also accurate. It was in response to Fee's question about whether she knew of anything that would have upset Delp so much that he would have taken his life that Micki replied that what she knew had upset him the most at the end was the "dis-invitation" of Cosmo:

> I would say despair is a fair word [to describe how Delp felt about Cosmo being fired], and I would say despondent is a word that would describe it.

A998, 1002, 1006-1018, 1066-1067, 1072-1077, 1080, 3097-3098.

As soon as she got off the phone interview with Micki, Fee sent an email to Scholz' publicist recording what Micki had told her — "she says Brad was in despair because Fran Cosmo was disinvited from the summer tour" — and asking for a comment. Scholz replied with a statement that the firing of Cosmo had been a "group decision," suggesting that Delp had approved it. The Herald duly reported Scholz' statement in the March 16 article. A382-383, 982-983. The article also disclosed that Delp had left a suicide

note which blamed his decision to end his life on *himself*:

> "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."

It further disclosed that Delp's fiancée had told police that Delp "had been depressed for some time, feeling emotional (and) bad about himself." A381-384.

It *was* Micki's opinion that the exclusion of Cosmo was "a large part of Brad's decision to take his life" and she has confirmed that the Herald conveyed her personal opinion accurately:

> My opinion of what caused Brad to take his life — I had my own opinions about it, and I feel somewhat responsible in actually maybe conveying that to the Herald at this time. And it was my personal opinion that Fran being disinvited from this tour was a large part of Brad's decision to take his life.
>
> . . .
>
> Brad could not — could not do that tour without Fran. He could not do it, and he expressed that to me. He told me he was quitting the band. His — his distress at the situation of Boston had dramatically increased in frequency of him speaking about it with me, increased in the intensity of the way he expressed it to me. So sitting here today, I'm even more convinced that my opinion that I held then is in fact the — exactly what caused Brad to take his life.

A1014-1015.

The headline of the March 16 article was "Pal's snub made Delp do it: *Boston rocker's ex-wife speaks*." The online edition contained those words and also added the sub-headline: "*Delp's ex says 'No one can possibly understand*.'" A381 (emphasis supplied).

PETITIONERS' MISSTATEMENTS

Pursuant to Supreme Court Rule 15.2's requirement that misstatements in the Petition be noted, the Herald notes the following misstatements.

First, the Petitioners describe at length an incident shortly before Delp's death in which Delp taped a camera to the ceiling of his fiancée's sister's bedroom and expressed great remorse for having done so. Pet. Br. at 5-6, 10. Petitioners not only suggest that this was known to the Herald at the time the articles were published, they strongly imply that this was the case. *See id.* at 6 ("The articles did not mention any other potential cause [of the suicide], such as the incident with Meg Sullivan."). Not only was it undisputed that the Herald had no information about this incident until years after the litigation began, which itself was three years after the articles were published, but Scholz *admitted* at the summary judgment hearing that the Herald had no knowledge of this incident when the articles were published. Scholz likewise admitted in his summary judgment papers that neither the Herald nor Micki knew anything about this incident at the time the articles were published.[6]

Second, the Petitioners repeatedly characterize the Herald articles as containing statements that a review

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[6] *See* Herald App. at 121a ("The Court: It's not information that the Herald people has [sic]? Mr. Carter: They didn't have it."); *see also* A1116-17, 1119.

of the articles makes clear were not made. *See, e.g.*, Pet. Br. at 7 ("The article concluded that a recent incident precipitated by Petitioner Scholz had increased those pressures [on Delp], driving Delp to suicide"); *id.* at 10 ("[T]he Herald's articles again unmistakably conveyed the conclusion that Scholz' mistreatment of Delp was the cause of his decision to take his own life"); *id.* at. 11 ("The Herald thus repeatedly attributed Delp's suicide to Scholz without any exploration of other causes.").

Third, the Petitioners assert that by May 2012 — over five (5) years after the articles at issue in this case were published and over two (2) years after this litigation regarding those articles began — the Herald knew of e-mail messages regarding the camera incident. *Id.* at 10. Petitioners rely on two articles about this litigation published by the Herald. *Id.* What Petitioners fail to point out is that *those* articles were *not* the subject of any defamation claim.

Fourth, the Petitioners' assertion that "the Herald knew" of a "vendetta" that Micki purportedly had against Scholz is unaccompanied by any reference to the factual record and is inaccurate. *See* Pet. Br. at 8.

ARGUMENT

I. THE SJC'S DECISION AFFIRMING SUMMARY JUDGMENT

The SJC did not need to reach the Herald's arguments that given the undisputed evidence that the Herald had accurately reported Micki's views and those of others who knew Delp, and given that those views were undisputedly based on what Delp had told them and others, Scholz could not meet his burden of showing by "clear and convincing evidence" that the

Herald had published its articles with "a high degree of awareness of their probable falsity." *Lane v. MPG Newspapers*, 781 N.E.2d 800, 807-08 (Mass. 2003); *see Time, Inc. v. Pape*, 401 U.S. 279, 290-292 (1971) (actual malice could not be established where reporter made a rational but incorrect interpretation of his sources' comments). Nor did the Court need to reach the Herald's argument that where, as here, Scholz himself was unable to identify any false statements of fact "of and concerning him" that appeared in the articles, let alone ones that defamed him, as a public figure he could not rely on a collection of non-actionable statements to assert that "in the aggregate they have an insinuating overtone." *Mihalik v. Duprey*, 417 N.E.2d 1238, 1241 (Mass. App. Ct. 1981) (vacating jury verdict in favor of plaintiff public official where the article in issue contained no false statements; innuendo based on non-actionable statements was not enough to establish defamation); *see Gouthro v. Gilgun*, 427 N.E.2d 1166, 1168 (Mass. App. Ct. 1981) (similar).

Instead, the SJC applied the settled principles repeatedly applied by Massachusetts courts, some established by this Court and some rooted in independent Massachusetts common law and the Massachusetts Declaration of Rights, to conclude that, even assuming *arguendo* that the Herald articles could reasonably be said to express the view that Scholz was "to blame" for Delp's decision to take his life, they could not reasonably be interpreted as having asserted this as fact. *See Scholz*, 41 N.E.3d at 41.

The SJC summarized its holding at the outset of its opinion:

> We conclude that the newspaper articles and statements contained therein constitute non-actionable opinions based on disclosed non-defamatory facts that do not imply undisclosed defamatory facts.

Id. Repeatedly citing its holding in *Lyons v. Globe Newspaper Co.*, 612 N.E.2d 1158 (Mass. 1993), the SJC emphasized that "an opinion based on disclosed or assumed non-defamatory facts is not itself sufficient for an action of defamation." *Scholz*, 41 N.E.3d at 47.

> 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." It does not appear "that any undisclosed facts [about Scholz' role in Brad's suicide] are implied, or if any are implied, it is unclear what [those might be]." Moreover, it is entirely unclear (even assuming that facts are implied) that they are defamatory facts.

Id. at 48 (alterations in original) (internal citations omitted) (quoting *Lyons*, 612 N.E.2d at 1163, and *Cole*, 435 N.E.2d at 1027).

In *Lyons*, the SJC reversed the denial of the defendant's motion for summary judgment and entered judgment for the defendant on the ground that the complained-of statements were non-actionable opinion. *See* 612 N.E.2d at 1165. In so holding, the SJC cited reasons grounded independently in Massachusetts common law and the Massachusetts Declaration of Rights, stating:

> [W]e hold that under established principles of Massachusetts law the challenged statements were not actionable. . . . [T]he rule protecting expressions of opinion based on disclosed or assumed non-defamatory facts is by now an integral part of our common law. While we have traced the "constitutional roots" of this rule to the First Amendment, such constitutional underpinning may be found also in art. 16 of our Declaration of Rights. . . . [*T*]*he independent protections of freedom of speech which are found in our common law and in art. 16 would lead us to the same result even if there existed no Federal constitutional support for the principles which we applied*.

See id. at 1163-65 (emphasis supplied) (internal citations omitted).

The SJC also applied the rule that this Court affirmed in *Milkovich* that constitutional protection is required for statements that "'could not reasonably [be] interpreted as stating actual facts about the public figure involved.'" *Milkovich*, 497 U.S. at 17 (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988)); *see Scholz*, 41 N.E.3d at 45. The SJC concluded that "[t]he statements at issue could not have been understood by a reasonable reader to have been anything but opinions regarding the reason Brad committed suicide." *Scholz*, 41 N.E.3d at 46, 47 ("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."). In reaching its conclusion, the SJC cited factors that Massachusetts courts have frequently employed to analyze whether a

reasonable reader would regard statements as assertions of fact, noting that the articles had used "cautionary terms," such as "may have" and "reportedly," the fact that the statements appeared in an entertainment news column, and the patently conjectural nature of the articles themselves. *Id.* at 46-47.

Finally, the SJC also applied the well-established rule of law affirmed in *Milkovich* that "a statement 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*, 497 U.S. at 19 (citing *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986)); *see Scholz*, 41 N.E.3d at 41, 45 ("a statement that does not contain 'objectively verifiable facts' is not actionable" and holding "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").[7]

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[7] Petitioners further argue that their petition should be granted based on the SJC's "observation" in *dicta* that "[w]hile we can imagine rare circumstances in which the motivations for a suicide would be manifestly clear and unambiguous, this is not such a case." *See Scholz*, 41 N.E.3d at 46; *see also* Pet. Br. at 3. Petitioners' suggestion that this *dicta* constitutes the establishment of a "categorical presumption" regarding statements accusing others of blame for a suicide is incorrect. As noted *supra*, the SJC's decision was grounded in the application of three well-established rules of law. As for the SJC's observation that "this is not such a case," it was Scholz himself who stipulated that in order to prevail in the case he would have to prove that Scholz and the band Boston were *not* factors in Delp's thought processes about suicide. *See* Herald App. at 122a; *see also Scholz*, 2013 Mass. Super. LEXIS 83, at *29, Herald App. at 44a. Where the

II. THIS CASE IS NOT APPROPRIATE FOR REVIEW BY THIS COURT FOR SIX REASONS

The Petitioners' petition for writ of certiorari should be denied for six separate reasons.

A. The SJC Did Not Create A "Categorical Presumption" That Claims About A Person's Motivations For Committing Suicide Are "Exempt" From Liability For Defamation

Contrary to the Petitioners' representations, the SJC did not in any way, shape or form create "a categorical presumption exempting from defamation actions statements about a person's motive in committing suicide," *see* Pet. Br. at 2; *see also id.* at 3 ("the SJC created a special rule for the cause of suicides"); *id.* at 14 ("the SJC applied a categorical (and essentially irrebuttable) presumption that the cause of suicide is not provable"); *id.* at 17 ("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"). Indeed, not only has the "important question" of whether statements placing blame for a suicide are "categorically" exempt from defamation claims decidedly not "divided" the courts; *no* appellate court appears to have held that such a presumption exists.

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summary judgment record was replete with dozens of undisputed statements made by Delp to his oldest or closest friends and to his doctor in the weeks and months prior to his suicide about Scholz and the band, the SJC was correct: this was not a case in which Scholz had a reasonable expectation of proving that he and the band were not even factors in Delp's thought processes.

Moreover, the SJC also did not issue such a holding. It did not create, endorse or suggest either a "presumption" or an "exemption." Instead, it conducted an analysis rooted in Massachusetts law that is entirely consistent with this Court's holdings and applied rules of law set forth by this Court in *Hepps* and *Falwell*, which were reaffirmed by this Court in *Milkovich*.

B. There Is No Conflict At All Raised By This Case, Let Alone A "Significant Conflict"

Contrary to Petitioners' contention, the SJC did not in any way "deepen[] a significant conflict among many state and federal courts as to whether statements about the cause of a particular suicide . . . are categorically exempt from claims of defamation." Pet. Br. at 2. Petitioners' even more expansive assertion that there is a "deep and abiding conflict among courts as to whether statements . . . about motive for suicide specifically are categorically exempt from defamation claims," *see id.* at 21 (capitalization omitted), is also incorrect. The Petitioners point to no case that holds that statements about the cause of suicide are exempt from defamation liability, categorically presumed exempt, or even simply presumed exempt.

Petitioners point to exactly two cases that address the issue the SJC considered in *Scholz*: whether statements purportedly blaming the plaintiff for another's decision to commit suicide could reasonably be interpreted as an assertion of fact. One is *Scholz* itself and the other is *Gacek v. Owens & Minor Distrib. Inc.*, 666 F.3d 1142 (8th Cir. 2012). Both courts held that the statements in issue were not assertions of fact.

Indeed, the case on which Petitioners rely for asserting that a "significant conflict" exists, *Tatum v. Dallas Morning News*, not only is not a decision by a state court of last resort, but it also was decided after the SJC's decision in *Scholz* and expressly distinguished *Scholz* precisely because it did *not* involve a claim that the plaintiffs were to blame for a suicide. *See* No. 05-14-01077-CV, 2015 Tex. App. LEXIS 13067, at *44 (Tex. App. Dec. 30, 2015) ("[The *Gacek* and *Scholz*] cases are distinguishable because *the case before us does not turn on the verifiability of the column's statement about the cause of Paul's suicide*. Rather, this case turns on the verifiability of the column's accusation of deception against the Tatums. Accordingly, *Gacek* and *Scholz* are not on point." (emphasis supplied)).

Petitioners cite three other cases that involve defamation claims and suicide; none suggests any conflict among courts. *Yohe v. Nugent* did not involve a statement that the plaintiff was responsible for a suicide, but rather involved a statement by a defendant that the plaintiff "was suicidal." 321 F.3d 35, 40 (1st Cir. 2003). Significantly, summary judgment for the defendant was affirmed in relevant part on the basis that such a statement was "*plainly . . . opinion*." *See id.* (emphasis supplied). Notably, *MacRae v. Afro-American Co.*, 172 F. Supp. 184 (E.D. Pa. 1959), *aff'd* 274 F.2d 287 (3d Cir. 1960) and *Rutt v. Bethlehems' Globe Publ'g. Co.*, 484 A.2d 72 (Pa. Super. 1984) did *not* address the issue of whether a statement blaming plaintiff for a suicide was non-actionable opinion, but rather were limited to the issue of whether such a statement could be reasonably viewed as *defamatory*. *See MacRae*, 172 F. Supp. at 187; *see Rutt*, 484 A.2d at 77. In short, and contrary to the Petitioners' principal argument, there is no conflict of

any kind among federal and state courts on the issue decided by the SJC, let alone a "significant conflict," and far less a "deep and abiding" one.

C. The SJC Did Not "Depart" From This Court's Decision In *Milkovich*

The SJC did not "depart from the Court's core holding in *Milkovich*" that there is no need to create a wholesale exemption for anything that might be labeled opinion. Pet. Br. at 2. To the contrary, it embraced that holding. *See Scholz*, 41 N.E.3d at 47 ("We recognize that there is no 'wholesale defamation exemption for anything that might be labelled opinion.'" (quoting *Milkovich*, 497 U.S. at 18)). It simply applied the rules of law set forth in decisions by this Court that were expressly reaffirmed in *Milkovich*. *See Milkovich*, 497 U.S. at 19-20 ("Foremost, we think that *Hepps* stands for the proposition that a statement 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. . . . *Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false connotation will receive full constitutional protection."); *id.* at 20 ("Next, the *Bresler-Letter Carriers-Falwell* line of cases provides protection for statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual." (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) and citing *Greenbelt Coop. Publ'g Ass'n, Inc. v. Bresler*, 398 U.S. 6 (1970) and *Letter Carriers v. Austin*, 418 U.S. 264 (1974)).

D. The SJC's Decision Is Supported By Independent and Adequate State Law Grounds, And By Other Grounds

As demonstrated, *supra*, the SJC's decision was expressly grounded in its determination that the Herald's supposed "insinuation" that Scholz was to blame for Delp's decision to take his life, assuming *arguendo* such an insinuation was made, would constitute at most an opinion "based on disclosed non-defamatory facts that do not imply undisclosed defamatory facts." *Scholz*, 41 N.E.3d at 41. In so holding, the SJC relied on its prior decision in *Lyons*, *see Scholz*, 41 N.E.3d at 47, which expressly held that the rule protecting such expressions was independent of the First Amendment and based both on common law and Article 16 of the Massachusetts Declaration of Rights. *See Lyons*, 612 N.E.2d at 1164 ("[T]he independent protections of freedom of speech which are found in our common law and in art. 16 would lead us to reach the same result even if there existed no Federal constitutional support for the principle which we applied.").

This Court has frequently stated that if the same judgment could be rendered by the state court after this Court had corrected an incorrect interpretation of federal law, this Court's decision would amount to a mere advisory opinion, which mitigates against granting a writ of certiorari. *See*, *e.g., Lambrix v. Singletary*, 520 U.S. 518, 522-23 (1997) (citing *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)); *Herb v. Pitcairn*, 324 U.S. 117 (1945). Thus, even if this Court were to rule that the SJC's decision were somehow inconsistent with this Court's precedent, the decision would stand on independent state grounds.

Indeed, quite apart from the common law and Massachusetts Declaration of Rights-based protections afforded opinion based on disclosed, non-defamatory facts, or where there are no implied undisclosed defamatory facts, as set forth in *Lyons* and relied on by the SJC here, there are two other grounds on which the Herald would have been entitled to summary judgment even if the SJC had concluded that the statements at issue were non-actionable opinion. First, Massachusetts courts have held that public figures may not be held liable on an "insinuation-in-the-aggregate" theory where there are no false, defamatory facts asserted about the plaintiff. *See Gouthro v. Gilgun*, 427 N.E.2d 1166, 1167-68 (Mass. App. Ct. 1981); *Mihalik v. Duprey*, 417 N.E.2d 1238, 1240 (Mass. App. Ct. 1981). Second, given the Superior Court's ruling that it was undisputed that the Herald had quoted and described its sources' views accurately, and that those individuals' views were based on what Delp himself had told them, Scholz had no reasonable expectation of proving by clear and convincing evidence that the Herald had published its articles with a high degree of awareness of their probable falsity. *Time, Inc. v. Pape*, 401 U.S. 279, 290-292 (1971) (rational interpretation of sources' comments, even if incorrect, does not satisfy actual malice standard).

E. Contrary To The Petitioners' Assertion, The Issue Decided By The SJC Is One That Virtually Never Arises

Contrary to Petitioners' assertions that this Court should grant review because of the "[i]mportance of the [q]uestion [p]resented" and that "[r]eview is also warranted because of the great importance of limiting

false statements about the cause of the suicide," statements which Petitioners characterize as "particularly likely" to arise, their own petition demonstrates that the present fact pattern almost never presents itself. *See* Pet. Br. at 35; *see also id.* at 24-28. As pointed out *supra*, Petitioners have identified only four (4) cases in our history in which defamation claims have been brought on the basis of accusations that plaintiffs caused another to commit suicide. *See supra*, § II.B. As a general matter, the issue of suicide is of course an issue of importance. As the petition itself demonstrates, however, defamation claims based on accusations of blame for suicide have rarely presented themselves in our courts. *Cf. Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955) ("Special and important reasons [for granting certiorari] imply a reach to a problem beyond the academic or the episodic."); *Washington Fidelity Nat'l Ins. Co. v. Burton*, 287 U.S. 97, 101-102 (1932) (Stone, J., dissenting) ("Plainly the question is not of such general interest or importance as . . . warrants its review upon certiorari."); Stephen Shapiro, et al., *Supreme Court Practice* 505, 508 (10th ed. 2013) (certiorari regarded as inappropriate where "an issue may arise too infrequently to justify a place on the Court's docket" or "the ruling would only apply to a few people or have little real-world importance").

Put simply, the issue of whether statements supposedly attributing responsibility for the cause of a suicide are objectively verifiable statements of fact or non-actionable opinion virtually never arises, and is not of "such general interest or importance" to warrant certiorari review.

F. The Superior Court's Decision Granting Summary Judgment And The SJC's Decision Affirming It Were Based On A Voluminous And Highly Specific Factual Record

Finally, this case is not appropriate for review by this Court because both the Superior Court's decision and the SJC's decision affirming it were based on a voluminous factual record consisting of uncontroverted testimony from the articles' sources and approximately twenty (20) witnesses who described what Delp himself had told them in the weeks and months leading to his suicide. As the SJC observed, the Superior Court relied heavily on that record in reaching its decision. *Scholz*, 41 N.E.3d at 48.

This Court has repeatedly noted that cases that are based, or turn, on highly fact-specific records are not likely to be appropriate for review. *See, e.g.*, *Nat'l Labor Relations Bd. v. Hendricks Cty. Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (certiorari deemed improvidently granted where issue presented "primarily . . . a question of fact, which does not merit Court review"); *see also Kyles v. Whitley*, 514 U.S. 419, 460 (1995) (Scalia, J., dissenting) ("an intensely fact-specific case . . . [is] precisely the type of case in which we are *most* inclined to deny certiorari" (emphasis in original)). For this additional reason, the Herald submits that review by this Court is unwarranted.

CONCLUSION

The Herald respectfully requests that this Court deny Scholz' petition for a writ of certiorari.

Respectfully submitted,

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March 30, 2016

APPENDIX

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APPENDIX A

SUPREME JUDICIAL COURT
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SJC-11511 & SJC-11621

DONALD THOMAS SCHOLZ & another[1]

vs.

MICKI DELP.

DONALD THOMAS SCHOLZ

vs.

BOSTON HERALD, INC., & others.[2]

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

Present: Spina, Botsford, Duffly, & Lenk, JJ.

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[1] The DTS Charitable Foundation, Inc.

[2] Gayle Fee and Laura Raposa.

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

Civil action commenced in the Superior Court Department on October 12, 2007.

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

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

Civil action commenced in the Superior Court Department on March 11, 2010.

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

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

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

Kathy B. Weinman for Micki Delp.

Jeffrey S. Robbins for Boston Herald, Inc.

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

DUFFLY, J. In the mid-1970s, Donald Thomas Scholz, a musician, composer, recording engineer, and record producer, founded the rock band "Boston." After many years playing in the band, Brad Delp, who was its lead singer, committed suicide on March 9, 2007. The Boston Herald, Inc., published three stories

regarding Brad's suicide, written by columnists Gayle Fee and Laura Raposa, who relied on information from Brad's former wife, Micki Delp,[3] and various unnamed "insiders" and "friends." Scholz filed an action for defamation in the Superior Court against Micki, arguing that the statements made by her and reported in the newspaper articles insinuated that Scholz was responsible for Brad's suicide. Scholz later brought an action in the Superior Court for defamation and intentional infliction of emotional distress against the Boston Herald, Inc., and its two columnists (collectively, the Herald), based on the same statements as reported in the three articles.

The two cases were consolidated in the Superior Court after Micki had filed a motion for summary judgment. In August, 2011, a Superior Court judge allowed Micki's motion, Scholz appealed, and the Appeals Court reversed.[4] See *Scholz* v. *Delp*, 83 Mass.

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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 Fund*, 6 Mass. App. Ct. 631, 632, (1978). At this point, however, the judgment as to the Boston Herald, Inc., and its two reporters (collectively, the Herald) is final, the issues have been fully briefed by all parties, and the heavily interrelated claims are all before us. Because remand for further proceedings in the Superior Court would not be consistent with judicial economy, we exercise our discretion to

App. Ct. 590 (2013). We granted Micki's petition for further appellate review. Thereafter, in ruling on the Herald's motion for summary judgment, a different Superior Court judge concluded that Scholz could not establish a required element of his libel claim, i.e., that the articles contained any false statements of fact, and allowed the Herald's motion for summary judgment on the ground that the reported statements constituted nonactionable opinion. The judge also allowed the Herald's motion for costs. We granted Scholz's petition for direct appellate review, and paired the cases for argument.

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

1. *Background*. We summarize the undisputed facts, drawn from the summary judgment record. The band Boston was founded in 1975, after Scholz and Brad obtained a recording contract with CBS/Epic Records, and Scholz hired band members Barry Goudreau, Sib Hashian, and Fran Sheehan to join the group. The

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decide the issues raised in Scholz's appeal from the decision allowing Micki's motion for summary judgment.

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

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 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

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

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

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

In March, 2007, the Herald published two articles concerning Brad's suicide. The articles, written by Fee and Raposa, appeared in the newspaper's entertainment news column, "Inside Track." The first article, published on March 15, 2007, was titled, "Suicide

confirmed in Delp's death," and stated that it was based on information from "unnamed insiders."[7]

The March 15 article stated, in relevant part:

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

[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.

> "Scholz' penchant for perfection and his well-chronicled control issues led to long delays between albums. As a result, Goudreau, Delp and Hashian released an album without him, which led to an irretrievable breakdown.
>
> ". . .
>
> "But the never-ending bitterness may have been too much for the sensitive singer to endure. Just last fall the ugliness flared again when Scholz heard some of his ex-bandmates were planning to perform at a tribute concert at Symphony Hall for football legend Doug Flutie—and then had his people call and substitute himself and Delp for the gig, sources say.
>
> "In fact, the wounds remained so raw that Scholz wasn't invited to the private funeral service for Delp that the family held earlier this week.
>
> "'What does that tell you?' asked another insider. 'Brad and Tom were the best of friends and he's been told nothing about anything.'"

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

responded that the decision to fire Cosmo had been a group decision.

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

> "Boston lead singer Brad Delp was driven to despair after his longtime friend Fran Cosmo was dropped from a summer tour, the last straw in a dysfunctional professional life that ultimately led to the sensitive frontman's suicide, Delp's ex-wife said.
>
> "'No one can possibly understand the pressures he was under,' said Micki Delp, the mother of Delp's two kids, in an exclusive interview . . . .
>
> "'Brad lived his life to please everyone else. He would go out of his way and hurt himself before he would hurt somebody else, and he was in such a predicament professionally that no matter what he did, a friend of his would be hurt. Rather than hurt anyone else, he would hurt himself. That's just the kind of guy he was.'
>
> "Cosmo, who had been with Boston since the early '90s, had been 'disinvited' from the planned summer tour, Micki Delp said, 'which upset Brad.'
>
> "But according to Tom Scholz, the MIT-educated engineer who founded the band back in 1976, the decision to drop Cosmo was not final and Delp was not upset about the

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

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

". . .

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

"According to Micki Delp, Brad was upset over the lingering bad feelings from the ugly breakup of the band Boston over 20 years ago. Delp continued to work with Scholz and Boston but also gigged with Barry Goudreau, Fran Sheehan and Sib Hashian, former members of the band who had a fierce falling out with Scholz in the early '80s.

"As a result, he was constantly caught in the middle of the warring factions. The situation was complicated by the fact that Delp's ex-wife, Micki, is the sister of Goudreau's wife, Connie.

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

On July 2, 2007, the Herald published a third article concerning Brad's suicide. The article, entitled "Delp tribute on," included a paragraph stating that Scholz and the original members of the band Boston "have been at odds for decades and the lingering bad feelings from the breakup of the original band more than 20 years ago reportedly drove singer Delp to take his own life in March."

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

Cefalu v. *Globe Newspaper Co.*, 8 Mass. App. 71, 74 (1979), cert. denied, 444 U.S. 1060 (1980).

b. *Plaintiff's case on a defamation claim*. To withstand a motion for summary judgment on a defamation claim, a plaintiff must have a reasonable expectation of proving four elements: first, the defendant made a statement, of and "concerning the plaintiff, to a third party"; second, the "statement could damage the plaintiff's reputation in the community"; third, the defendant was at fault for making the statement;[8] and fourth, the statement caused economic loss or, in four specific circumstances, is actionable without economic loss. See *Ravnikar* v. *Bogojavlensky*, *supra* at 629-630.

Furthermore, to be actionable, the statement must be one of fact rather than of opinion. "Statements of pure opinion are constitutionally protected," *King* v. *Globe Newspaper Co.*, 400 Mass. 705, 708 (1987), cert. denied, 485 U.S. 940 and 485 U.S. 962 (1988), "[b]ut there is no constitutional value in false statements of fact." *National Ass'n of Gov't Employees, Inc.* v. *Central Broadcasting Corp*., 379 Mass. 220, 227 (1979), cert. denied, 446 U.S. 935 (1980), quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974) ("However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas"). Whether

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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 (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. *Bildma*n, 455 Mass. 116, 143-144 (2009), cert. denied, 560 U.S. 904 (2010).

a statement is a factual assertion or an opinion is a question of law "if the statement unambiguously constitutes either fact or opinion," and a question of fact "if the statement reasonably can be understood both ways." *King* v. *Globe Newspaper Co.*, *supra* at 709, quoting *Aldoupolis* v. *Globe Newspaper Co.*, 398 Mass. 731, 733 (1986). See *Howell* v. *Enterprise Publ. Co.*, 455 Mass. 641, 671 (2010). While "[a] statement of fact is 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, cert. denied, 459 U.S. 1037 (1982) (statements which cannot be proved false cannot be deemed statements of fact).

As we have noted, "it is much easier to recognize the significance of the distinction between statements of opinion and statements of fact than it is to make the distinction in a particular case. . . . Nevertheless, sensible lines must be drawn." *King* v. *Globe Newspaper Co.*, *supra* at 709. In determining whether a statement reasonably could be understood as fact or opinion, a court must "examine the statement in its totality in the context in which it was uttered or published," and "must consider all the words used, not merely a particular phrase or sentence." *Cole* v. *Westinghouse Broadcasting Co.*, *supra* at 309, quoting *Information Control Corp.* v. *Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980). See *Driscoll* v. *Board of Trustees of Milton Academy*, 70 Mass. App. Ct. 285, 297 (2007). Factors to be considered include

"the specific language used"; "whether the statement is verifiable"; "the general context of the statement"; and "the broader context in which the statement appeared," see *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1, 9 (1990), quoting *Scott* v. *News-Herald*, 25 Ohio St. 3d 243, 250 (1986); as well as any "cautionary terms used by the person publishing the statement." *Lyons* v. *Globe Newspaper Co.*, 415 Mass. 258, 263 (1993), quoting *Fleming* v. *Benzaquin*, 390 Mass. 175, 180 (1983).

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

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

The statements at issue could not have been understood by a reasonable reader to have been anything but opinions regarding the reason Brad committed suicide. "[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, . . . the statement is not

actionable." *Haynes* v. *Alfred A. Knopf, Inc.*, *supra* at 1227. See *Milkovich* v. *Lorain Journal Co.*, *supra* at 9. See, e.g., *Gacek* v. *Owens & Minor Distrib., Inc.*, 666 F.3d 1142, 1147-1148 (8th Cir. 2012) (concluding that "anyone is entitled to speculate on a person's motives from the known facts of his behavior," and that statements that plaintiff "pushed [the decedent] over the edge," was "the straw that broke the camel's back," and "was the reason for [the decedent's] death" were nonactionable because they did not express objectively verifiable facts, but, rather, were defendant's "theory" or "surmise" as to decedent's motives in taking his own life [citation omitted]). Cf. *National Ass'n of Gov't Employees/Int'l Bhd. of Police Officers* v. *BUCI Tel., Inc.*, 118 F. Supp. 2d 126, 131 (D. Mass. 2000) ("the interpretation of another's motive does not reasonably lend itself to objective proof or disproof").

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

attention, so long as the headline remains a fair index of what is accurately reported below"). See, e.g, *Dulgarian* v. *Stone*, 420 Mass. 843, 850-851 (1995) (title of television news series, "Highway Robbery?," reporting on automobile insurance appraiser's business, constituted "rhetorical flourish or hyperbole, which is protected from defamation liability").

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

Scholz argues that, even if we conclude that the articles contained statements of opinion, rather than facts, the use of the words "insiders" and "friends" in the "Inside Track" column indicated the existence of undisclosed defamatory facts. We recognize that there is no "wholesale defamation exemption for anything that might be labeled 'opinion.'" *Milkovich* v. *Lorain Journal Co.*, *supra* at 18. Even a statement that is "cast in the form of an opinion may imply the existence of undisclosed defamatory facts on which the opinion purports to be based, and thus may be actionable."

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

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

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

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

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

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

d. *The Herald's motion for costs*. Scholz also challenges on appeal the allowance of the Herald's motion for costs, in the amount of $132,163.89, for stenographic services, deposition transcripts, fees for

[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."

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 (1992), and discern none here.

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

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

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

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

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

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

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

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

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

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Superior Court Department

Civil Action No.: 10-1010

DONALD THOMAS SCHOLZ,

Plaintiff,

v.

BOSTON HERALD, INC., GAYLE FEE, and LAURA RAPOSA

Defendants.

MEMORANDUM OF DECISION AND ORDER ON THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

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 Gaudreau, Sib Hashian, and Fran Sheehan in other roles. Around thirty years ago, there was a falling out between Scholz and the trio of Gaudreau, 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 1990's, 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]

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

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 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' 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 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 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 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 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 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 on Friday, his head on a pillow and a note paper-clipped to the neck of his shirt. He died sometime between 1i: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 Gouclreau,

> 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 (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 (1991); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 710 (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. 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 (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 estoppel 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 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 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.

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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.

Next, the defendants allege, that even assuming that 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 fake 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, defendant claims the plaintiff cannot prove that the Herald published these three articles with a high degree of awareness at the time that they were false. Plaintiffs respond 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 (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 (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 (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 (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' 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. 627-630 (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 (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 (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 (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

(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 (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. 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 (2003).

The March 15, 2007 article lead 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 the 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' 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' 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 (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, 430-431 (1991). The subjective test inquires as to whether the defendants intended the statements to refer to the plaintiff. *Id*. at 430. 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 (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 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 (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. "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 (2007) quoting

Cole v. Westinghouse Bdcst. Co., 386 Mass. 303, 309 (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 Broadcastin&.Corp.*, 379 Mass. 220, 226 (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 force or strained construction can be understood as stating a fact. *Myers v. Boston Magazine Co., Inc*., 380 Mass. 336, 341 (1980). The test for that is whether the challenged language can reasonably be read as stating a fact. Id. at 340.

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 (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(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

(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 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

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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.

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 (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 (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 "objectively verifiable facts" about the suicide's decision process. *Gacek* at 1147-1148. 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

[4] The plaintiff denies that Micki Delp made the statements attributed to her. This judge has ferreted through the 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.

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 (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. *Case v. Marcella*, 49 Mass. App. Ct. 334, 340 (2000) quoting *Sena v. Commonwealth*, 417 Mass. 250, 263-764 (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 (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.

By the Court,

/s/ Frances A. McIntyre
Frances A. McIntyre
Justice of the Superior Court

Dated: March 27, 2013

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Superior Court Department
Of The Trial Court

Docket No. SUCV2010-01010

SCHOLZ

v.

BOSTON HERALD, INC., ET AL.

TRANSCRIPT OF HEARING: RULE 56 MOTION
BEFORE THE HONORABLE
FRANCES A. MCINTYRE

Volume: I
Pages: 1-97
Exhibits: None

Boston, Massachusetts
Courtroom 1008
October 10, 2012

Proceedings recorded by Court Personnel
Transcript produced by Michelle Costantino,
Approved Court Transcriber

[1-2] APPEARANCES:

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[1-3] PROCEEDINGS

(Proceedings commenced at 2:06:00 p.m. on JAYS audio recording.)

THE CLERK: Now calling Civil Action Number 2010-1010, Scholz versus Boston Herald, Inc., et al. This is on for a motion for Rule 56.

Would you please come forward and identify yourself for the Court and the court record, please.

MR. CARTER: Good afternoon, Your Honor. Nick Carter and Seth Robbins for the plaintiff, Tom Scholz.

THE COURT: Mr. Carter, Mr. Robbins, good afternoon.

MR. J. ROBBINS: Good afternoon, Your Honor. Jeff Robbins and Joseph Lipchitz for the defendants.

THE COURT: Mr. Robbins.

MR. J. ROBBINS: You have in the past, I think, asked that if there were parties in the courtroom—

THE COURT: I have.

MR. J. ROBBINS:—that you'd want to be—so, for that reason, I want to introduce you to Patrick Purcell, who's the publisher of the Boston Herald. Joseph Sciacca, who is the editor-in-chief of the Boston Herald. And Laura—

THE COURT: Mr. Purcell, Mr. Sciacca, good afternoon, gentleman.

MR. J. ROBBINS: And Laura Raposa and Gayle Fee, who [1-4] are journalists who—

THE COURT: Ms. Raposa, Ms. Fee. Good afternoon, all. Mr. Sciacca, Mr. Purcell, Ms. Fee, Ms. Raposa, most welcome.

Anybody—simply to acknowledge them. No expectation. Anybody from the plaintiff's side? Okay. All are most welcome. Happy to have you with us this afternoon.

All right. So, we have an important motion on today, Rule 56 matter, motion for summary judgment brought by the defendants. There is considerable materials that have been filed in the case. I never have the opportunity to go through things the way I would like to.

You all know that we were tied up last week one morning on an impoundment motion on this case, and I lost additional time simply writing a memorandum with regard to that. And so I really am going to do this hearing as a first cut.

I got a call yesterday from Mr. Lipchitz to find out how much time I'd give you to today. I'm going to give you all the time I've got, till 4 o'clock. And if we need more time, and I think we may well need more time, I'm happy to give you that. Particularly after I hear

from you and give some further consideration, I will perhaps want to hear further from you.

But what I'll do is figure that I'll give each side 45 minutes and then see if there's any final comments and—like that.

[1-5] MR. J. ROBBINS: Your Honor, I was going to propose, if it's acceptable to you, given all of that, that I try to get through the argument on count one, the defamation count. And then turn it over to Mr. Carter, and hold to a subsequent hearing the relatively short emotional distress claim, which is count two, and in addition any replies or surreplies in terms of arguments, if that's acceptable to you.

THE COURT: How does that sound, Mr. Carter?

MR. CARTER: Well, I would propose—I don't know how this will play out in terms of the time it will take to get through count one, but if there is time, that we try to get through both. If there is not, we need to come back, that's fine.

THE COURT: Okay.

MR. CARTER: Of course.

THE COURT: All right. I think I would like to try to get through both, Mr. Robbins.

MR. J. ROBBINS: I'm unlikely to reach the count two, but I'll—

THE COURT: Okay. All right. Why don't I—how much time do you think it's going to take you to do your presentation on count one, Mr. Robbins?

MR. J. ROBBINS: I think it's going to be 45 to 50 minutes.

[1-6] THE COURT: Okay. I'll give you 45. Okay? And I will certainly have some questions in there, and I know you're ready for that, but I will try to give you that full time.

And then you're going to argue, Mr. Carter?

MR. CARTER: Yes.

THE COURT: All right. And then I'll give you 45 minutes, as well. And we'll see how we do.

Okay, then. You're all most welcome. You can use the podium or wherever you choose to address me from. Just let me get my notes.

You should know that I have not been able to go through all of the exhibits. I have been through most of the pleadings. I have a pretty good grasp of the basis of the motion. So,—

MR. J. ROBBINS: Your Honor, do you have the articles? We'd like to give you, if we can, at the outset before I begin, the articles with numbered paragraphs. Because I'm going to be talking about those articles.

They are attached to the complaint.

THE COURT: Okay.

MR. J. ROBBINS: I'm sorry. They're attached to our motion for summary judgment. And there is a chart by which we'll take you through each and every statement in that—those articles, walk you through each and every one of them.

But for present purposes, we have the three articles [1-7] with numbered paragraphs for your ease, which I'm going to be referring to.

MR. LIPCHITZ: Your Honor, we have a copy set for you.

THE COURT: Thank you. Thank you. Thank you. I see.

All right. Okay. I have it.

MR. J. ROBBINS: Thank you, Your Honor. You've been introduced to Ms. Fee and Ms. Raposa. Mr. Scholz has accused them of having, quote, "fabricated articles." And with—

THE COURT: Excuse me. Forgive my interruption.

MR. J. ROBBINS: Yes.

THE COURT: You wouldn't have another copy of this; would you,—

MR. J. ROBBINS: Yes, we do.

THE COURT:—Mr. Lipchitz?

MR. J. ROBBINS: We should. You can have mine, if you don't.

THE COURT: Would you make it available to my law clerk?

MR. LIPCHITZ: Oh, absolutely.

THE COURT: I think that will just assist us. Thank you.

Sorry, Mr. Robbins.

MR. J. ROBBINS: No problem, Your Honor.

The allegation that these journalists have fabricated [1-8] these articles is not merely complete garbage, to use the phrase that Mr. Lipchitz selected last week. It is disgraceful, as I propose to demonstrate to you.

Mr. Scholz also alleges that they accused him of being to blame for Brad Delp's decision to take his life. And as you're going to see from examining these articles, article by article, statement by statement,

that is also respectfully nonsense. There are no such statements.

There is a reason that defamation actions are (gap in audio recording from 2:11:31 to 2:11:37 p.m.) Rule 56 is where the rhetoric and where the artful accusations designed to be riveting to the most casual observer, as Mr. Scholz said in his email to his counsel, actually get scrutinized, starting with the scrutiny of what the articles actually say.

The issue in the case, the issue before you is, is there any actual statement in these articles that survives the five constitutionally required tests that you are obliged to impose to everything that they say is actionable.

It's the stage at which Mr. Scholz has to actually come out and tell you what are the specific statements in these three articles that are supposedly actionable.

He claims that the Herald made a statement of fact that he was to blame for Brad Delp's suicide. Fabulous. Where is it? Show it to us. Give us the actual words and the [1-9] actual statement and the actual article so we can hold it up and look at it.

And if it survives these five tests, that statement goes to a jury and a jury interrogatory; and if they find in favor of the plaintiff, it goes to the appellate court for scrutiny.

Not rhetoric, no cutting and pasting, not supplying his own words in place of the words that the Herald actually used. Point to the specific words, so we can all hold it up and look at it.

So, number one is we're going to ask you to conduct the article-by-article statement-by-statement analysis that the law requires the Court to conduct.

It's the same statement-by-statement analysis that the long litany of Superior Court justices and appellate courts that have granted or mandated summary judgment have done in defamation cases.

It's the analysis that Judge Cratsley did when the Delp case finally reached the full Rule 56 stage.

It's the analysis that Mr. Scholz did not want Judge Cratsley to do, and urged him not to do at that stage.

And it's the analysis, frankly, that Mr. Scholz does not want you to do.

It's why we begin with showing you the three articles, as you'll see.

[1-10] What is required is that every supposedly actionable statement that gets held up and identified for us to look at, at long last, gets subjected to the following five constitutionally required tests.

If a statement doesn't survival each of these tests, all five of these tests, it's not actionable as a matter of law, and these journalists who've been accused of this for two and a half years are entitled to summary judgment.

The first test: Is the statement of and concerning Scholz, as opposed to other people, or a state of affairs, or a situation?

Two: Is any statement that actually is of and concerning Scholz reasonably construed as accusing him of defamatory wrongdoing?

Three: Is any statement which meets tests one and two, which is of and concerning him, and which can be reasonably construed as accusing of defamatory wrongdoing, is it one of objectively verifiable fact

provable as true or false, or is it somebody's opinion, and therefore constitutionally protected?

Four: Does Scholz have a reasonable expectation of demonstrating that any statement that survives those three tests is false? That's really not going to be an issue for summary judgment.

And five: Assuming that there is an arguably false [1-11] statement of objectively verifiable, provably false fact, that's of and concerning Scholz, under the governing standard, and accuses him of defamatory wrongdoing, has Scholz met the quote unquote daunting burden of educing clear and convincing evidence—that's the constitutional standard—that as—because he's a public figure—that the Herald published any such statement that emerges from that grinder, those tests, with a high degree of awareness, quote unquote, that it was, quote, "probably false," close quote.

If there's any statement in these articles that meets those five tests, all five of them, there should be a trial on that specific statement.

But if we're correct that there is not, then these journalists are entitled to summary judgment on the entirety of the case.

Now, because we're only now at the Rule 56 stage, that analysis has never been done in this case. Naturally, it was not done at the 12(b)(6) stage because it's a light burden. There was no article-by-article analysis, there was no statement-by-statement analysis. There shouldn't have been, arguably, because it's Rule 12(b)(6). It's a light review.

That's why Judge Cratsley in fact only did that statement-by-statement analysis in the Delp case when it had [1-12] reached the Rule 56 stage.

And as I'll describe in a few minutes, that's where he actually went through the statements, one by one, six statements—each of the six statements that are at the heart of the claim against Micki Delp, and which are frankly at the heart of the case against the Herald, and ruled that as a matter of law, for three separate reasons—three separate reasons, it just wasn't actionable. It didn't matter who said it. It just wasn't actionable.

So, I repeat, the examination of these articles is all that's required. You have been given boxes of transcripts purporting to dispute the indisputable testimony about what Brad told his doctor, his fiancee, his former wife, his former bandmates, his current bandmates, Meg Sullivan, his close friend, his fiancee's sister.

What they have all testified about, what Brad told them about his detestation of and loathing of Scholz, his fear of him, his feeling that he had abused him, that he wanted to have nothing further to do with him.

You can ignore all of these boxes, as far as I'm concerned, unless you're otherwise moved.

Most of these boxes represent Mr. Scholz's attempt to get you to throw up your hands and say there must be so much dispute in this case, this cannot possibly be a summary judgment case, look at all these boxes.

[1-13] We've referred to this in our papers as the dump truck defense to summary judgment.

You can ignore all of their boxes. And by the same token, you can ignore all of our boxes.

We filed a motion to strike their stuff because you can't really dispute what Brad—the testimony of what Brad told these people. There are two people involved in the conversations, them and Brad.

Brad is not there. They've said Brad told them about it. So, we filed a motion to strike, saying you can't dispute that. Never mind. You can ignore our motion to strike, ignore all these boxes.

These journalists are entitled to summary judgment on four separate bases that make it totally unnecessary for you to look at these boxes or the statements of fact, or our motions to strike, for that matter.

Because they—all that you have to look at is three things, the March 15th article, the March 16th article and the July 2nd article, line by line.

Now I pause for a second to say that because they understood that if you actually reviewed these articles statement by statement, the way Judge Cratsley did in the Delp case, you—the case was over, what they have taken to doing now is saying well, you should also consider a radio interview that Ms. Fee gave and an article dated January of [1-14] 2008.

They appear nowhere in the complaint. They appear nowhere in the amended complaint. The law is very clear that defamation plaintiffs have to actually identify what it is that's supposedly actionable in the complaint, and you can't do this kind of end run.

Judge Cratsley had a deadline for amending claims. They amended it once. That deadline expired 18 months ago, somewhere between 18 months ago and 24 years ago.

And so what they did, in order to avoid having Judge Cratsley rule on an amendment, they never moved to amend. They let—preferred to let the order expire and try their luck with you and to see if they could get you to ignore the order, the rules, the case law that says you can't add stuff that you haven't pled.

So, there's nothing in there about these two items. So they're stuck with the three articles. And here are the questions for the Court:

Where is there a statement of fact by the Herald that Tom Scholz is responsible for the death of Brad Delp?

Mr. Carter told you as recently as last week that the Herald reported that Tom Scholz killed Brad Delp. Where is it? Show us the statement.

Two: Where is there a statement that is of and concerning Scholz? There are some statements in the [1-15] articles that are of and concerning Scholz.

Where there is one, does any statement of and concerning Tom Scholz accuse him of defamatory wrongdoing? That's part of the analysis that Judge Cratsley did in the—in dealing with the March 16th article.

And fourth: If there's any statement of and concerning Scholz that accuses him of defamatory wrongdoing, is there any statement that is objectively provable? And there are cases that are directly on point, which is why I flag it.

So, first, if reading these articles alone does not—statement by statement does not satisfy you that the answer is the same as Judge Cratsley was when he did the six statements in the March 16th article, then we'll ask you to take a look at a fourth document. And the

fourth document is Judge Cratsley's decision granting summary judgment in that case.

In that case, what he did is he took the four quotes by Micki Delp—there are four quotes, four statements that purport to quote her, and four statements which do not purport to quote her, which purport to summarize the substance of the interview back and forth in the Herald's words, the lead, the first paragraph, and say—and he ruled that I've now looked through them.

I don't care who said them. They are not of and concerning Scholz. They don't even mention Tom Scholz, [1-16] literally do not mention his name. They do not accuse him of defamatory wrongdoing. Rather, they're about Brad Delp's state of mind when he took his life.

And three, there's no evidence, and I rule, that Micki Delp did not utter these things, which—with a high degree of awareness of their probable falsity.

Now, I pause. I'll come back to this. But you understand they're arguing that the Herald published Micki Delp's statements with a high degree of awareness of their probable falsity.

Judge Cratsley has already ruled that Micki Delp didn't say them to the Herald with what—that's called actual malice.

So, if she didn't utter them to the Herald with actual malice as a matter of law, under this ruling, how could the Herald have published statements not made to it with actual malice as a matter of law, with actual malice.

The four statements by Ms. Delp and the two paragraphs written by the Herald are what they are.

I'll walk you through them when I get to that portion of the argument.

Either they're actionable statements or they're not actionable statements. Judge Cratsley's ruling that they're not actionable statements means as a matter of collateral estoppel they're not actionable statements.

If there's any other statement in the article that [1-17] could conceivably be actionable, I am all ears. And Mr. Scholz will have to now identify it for us. But there must be some other actual identifiable actionable statement in the March 16th article in order for there to be left anything—anything left on the March 16th part of the case under the doctrine of collateral estoppel.

There is one statement which Judge Cratsley did not expressly rule on. It's the headline. The only actual, identifiable statement that he didn't rule on was the headline. But it's a headline that doesn't even mention Tom Scholz, and simply summarizes the lead paragraph.

A lead paragraph which Judge Cratsley has ruled: A, was not of and concerning Scholz; B, did not accuse him of defamatory wrongdoing; and C, wasn't uttered with actual malice. So, the headline is out of the case as well.

So, quite apart from—

THE COURT: I'm going to just—I'm going to interrupt you for a second, Mr. Robbins,—

MR. J. ROBBINS: Yes.

THE COURT:—and just stop you a bit on your claim that Judge Cratsley's decision is a matter of collateral estoppel.

There is no final judgment on Judge Cratsley's decision—

MR. J. ROBBINS: Yes, there is.

[1-18] THE COURT: Is there a final judgment on it?

MR. J. ROBBINS: Oh, yes. Under the law, the collateral estoppel effect on—I doubt this is going to be disputed. The law is very clear. It's on appeal, but it's final judgment. It's on appeal. That's the case that's on appeal—

THE COURT: Right.

MR. J. ROBBINS: The collateral estoppel effect is in effect right now. The fact that it's on appeal doesn't mean anything in terms of collateral estoppel. There is a final judgment. It was entered. It is on appeal to the Appeals Court. Mr. Scholz has appealed it.

THE COURT: And what about the observation that the parties are different and the issues are different. It only regards the one article and the statements of Micki Delp, not all of the articles, including the assertions allegedly made by the Herald?

MR. J. ROBBINS: Oh, no. You're right that the collateral estoppel effect—the collateral estoppel effect only applies to the six statements in the March 16th article. It doesn't apply to the March 15th article, and collateral estoppel doesn't apply to the July 2nd article.

But as you'll see, if it statements that Judge Cratsley ruled as a matter of law were not actionable on the 16th, then there is nothing in the March 15th article that could [1-19] be actionable either. There certainly is nothing in the July 2nd article that could be actionable either.

And the only statement left that is identifiable in the March 16th article is the headline. But as I've just said, the headline is just a summary of the lead, which the Court ruled is not actionable.

So, you're correct, the collateral estoppel—the first reason we're entitled to summary judgment, we're going to say, we do say, are your own examination of the three articles.

Second of all, the collateral estoppel effect, per se, applies to the six statements in the March 16th article.

But by the same token, as I said, where the headline just summarizes a non-actionable lead, it can't be actionable either.

And when you compare anything in the March 15th article and in the July 2nd article with what Judge Cratsley has already ruled is not actionable, there can't be anything left there either. Not by the doctrine of collateral estoppel, but just by the analysis.

THE COURT: Okay. Go ahead, Mr. Robbins.

MR. J. ROBBINS: Thank you.

So, that's four documents that entitle these journalists to summary judgment on two bases. One is the three articles, and the fourth—I mean, one, two, three [1-20] are the three articles. The fourth is Judge Cratsley's decision.

There's a third basis that we're going to walk you through we're entitled to summary judgment, and those involve two other documents. One is the Massachusetts Appeals Court's decision in the *Driscoll* case. That's the pressured into sex case. And the other is the Eighth Circuit decision that came down just a few months ago in *Gacek*, which is—I mean, it is

directly on point. There is no daylight between the *Gacek* case and this case.

The *Driscoll* case, because it's the Appeals Court, governs. The Eighth Circuit doesn't naturally bind you, but I propose that when you review that case, and I'll walk you through it now, you'll see that in the allegations that Mr. Scholz makes says that the Herald made are exactly what was in fact at issue in *Gacek* and ruled non-actionable as a matter of law.

So, I've given you reasons—bases one and two. The third reason is in the *Driscoll* and the *Gacek* cases, because, as I've said, the case law is a First Amendment rule and it's applied over and over and over again, Superior Court cases, appellate—Appeals Court cases, SJC cases, First Circuit cases, all over, United States Supreme Court.

If a statement—let's assume it's of and concerning me and it defames me. No question about that. But it's not [1-21] one that is objectively verifiable. You can't prove that it's true or that it's false. It's constitutionally protected opinion, full stop.

So, in the *Driscoll* case, you'll recall that—I think you were familiar with it—

THE COURT: I've got it here. I've got the case here. I've looked at it. I've looked at the discussion that—

MR. J. ROBBINS: The allegation was, you'll recall, that the student, the plaintiff, had said that—the defendant had said the plaintiff had pressured these girls into sex.

And Judge King dismissed that at the 12(b)(6) stage, saying it's non-actionable, and awarded costs to the defendant, because you can't know whether somebody was feeling pressured or not.

Now, the claim that Mr.—in Mr. Scholz's world is that the Herald said that Scholz pressured Brad Delp into taking his life; that Brad Delp took his life because of pressure, that that was the reason.

But if it was not verifiable whether or not these girls, who were around, who were alive to testify, were in fact feeling pressured, if that's not verifiable, if that's not inherently—if that's not capable of being proved true or false, how much more incapable of being proved true or false is what was in the mind of a now-deceased person, not [1-22] around to say what was in his mind at the time that he took his life?

THE COURT: So, let's stop there, because I looked at the discussion that you referenced on *Driscoll*. I didn't look at the *Gacek* case yet, but I did—I was very interested in—and the emphasis you put on it in your pleadings.

And I just don't see it as stating the distinction as you clearly do. You seem to raise it as a question of proof. Can it be proven or can it be disproven.

And it seems to me that the actual holding in the case on *Driscoll* has to do with whether it was an opinion stated on disclosed or undisclosed defamatory facts.

And ultimately that's what they rule on, that there was—it was clearly an opinion. And it looks like it was a press release, and that the press release says an opinion that the boy should have known it was a situation where coercion was implicit or explicit.

And it says that the—the press release itself actually appears to disclose the facts that opinion is based on. So, therefore, it's non-defamatory.

There is a footnote that says, "An assertion that cannot be proven false cannot be held libelous." But what you're saying doesn't seem to be the real basis of the opinion—

[1-23] MR. J. ROBBINS: Well, it does say the statement. There are actually two statements at issue in the *Driscoll* case. One of them is what you just read. And the other is that the student pressured or they were coerced. And that was non—they were all dismissed as non-actionable.

You're right that the holding about objectively verifiable is in the footnote. But there is no issue in this case about disclosed or non-disclosed facts. And the reason for that, of course, is that because it wasn't said.

So, in this case we have to assume—we have to pretend, in effect, that the Herald said Tom Scholz is the reason for Brad Delp's death. There is no issue about disclosed or non-disclosed facts. That has no bearing on this. There is nothing to disclose or not disclose.

THE COURT: Well, I—perhaps you're right. I'm just looking at the opinion that—the opinion—the decision that you are relying on.

It seems to me that you're saying to me, Mr. Robbins, that Mr. Delp's mental state at the time of his death cannot be proven one way or another.

MR. J. ROBBINS: That's of course true.

THE COURT: Well, I'm not so sure that it is, because essentially don't we instruct juries that mental state and intention can never be determined directly; but by circumstantial evidence, it can perhaps be proven?

[1-24] MR. J. ROBBINS: Whether some—what was in the mind—and the *Gacek* case is in fact on point. It says—I'll say it and then you'll hear that it said it.

Why a person—what was in a person's mind that caused him—that was the causing—that caused him to take his life is inherently unknowable. It is exactly the kind of thing—I can say that I think somebody took his life because of X or Y. I can't prove that. Nobody can prove yes it is or no it isn't.

It is exactly the kind of thing that, given the First Amendment, and the rules about protecting people's rights to express their opinion, cannot be—cannot be proven.

Let me point you to *Gacek*,—

THE COURT: Okay.

MR. J. ROBBINS:—because in that case—if there is daylight between that case and this case, I'll be educated.

In that case, it was absolutely said—there was no dispute—that the defendant had said as follows:

Plaintiff was the reason—quote, "the reason for Bill's death."

Plaintiff, quote, "pushed Bill over the edge.". Plaintiff, quote, "was the last straw that broke the camel's back."

Now, we don't have that in this case, but that's what they say we said. It's not a matter of disclosed facts or [1-25] undisclosed facts. That's what they say we asserted. We didn't. Right? There's nothing in there which says that.

But let's assume—let's pretend that the Herald had said that. Applying the very same substantive law that

exists in Massachusetts, because it's basic First Amendment law, here is what the Eighth Circuit said in 2012, affirming the District Court's granting of summary judgment. Quote:

"None of those statements express objectively verifiable facts about the decedent's decision process. Rather, they express the defendant's theory or surmise as to Showers'"—the person who took his life—"Showers' motives in taking his own life."

That's this case. That is this case. You can't prove why somebody took—by definition, it is surmised. We're talking about what caused a dead person to decide to take his life. And nobody can prove that as true or false.

And what may exist in a different context, in the First Amendment context, where people are—where the right of people to say what they think is holy, as the Eighth Circuit effectively held, you can't hold somebody liable for that.

Now, the fourth reason is actual malice. And it's one which, as with these other grounds, courts in Massachusetts regularly, regularly apply in granting summary judgment to defendants in public figures cases. Because the standard is constitutional, it is—the public figure has to show by [1-26] clear and convincing evidence that the defendant published the specific statement that meets these other tests while entertaining serious doubts about the truth or falsity.

Mr. Scholz produced no evidence that the Herald published anything with any knowledge that it was probably false, let alone clear and convincing evidence.

And it is not as you are being told, that oh well, this is a factual issue. It is not. It's a constitutional issue,

and there is a legion—a series of summary judgment cases, or cases reversing the denial of summary judgment, on this basis.

So, it doesn't matter—basically, the Herald interviewed people. It reported what the people told it. It was constitutionally entitled to do it. And the public is constitutionally entitled to hear those views, frankly, whether Tom Scholz likes that or not. That's what the First Amendment means.

I quote to you Judge Welch, who granted summary judgment for a newspaper in Essex Superior Court a couple of years ago, also quite a similar case. Quote:

"The Newburyport Daily News reporter and the companies that own the newspaper had no responsibility to investigate the validity of Ryan's opinion. These defendants were entitled to report this opinion, no matter how ill-founded it was."

[1-27] And that's the state with respect to the—of the Constitution on this.

So, Micki Delp expresses her views to the Herald. Judge Cratsley has already said they weren't about Scholz, they didn't defame him, and they weren't uttered with actual malice. Put that to one side.

She has confirmed six times to sundown that every single one of these quotes is in fact what she said. Everything she is quoted as having said, she said verbatim.

The Herald—and with respect to the lead and the—paragraph 15, as you'll see, which don't purport to be her words, the Herald didn't use quotation marks around them, which is the signal that they're not saying she said those words.

They're not fabricating it. The quotes go with what she said. The absence of quotes is obviously the summary that they're entitled to do.

In fact, she has confirmed six ways till sundown that although she absolutely never used those words—of course she didn't use the words, it's the reporter's words—that they conveyed the substance of what she indicated to the Herald.

In short, she said the Herald got it right. That was my opinion then. It is my opinion now. That I didn't say those words, but it conveys what I said.

[1-28] And as I say, Judge Cratsley has already ruled that Micki Delp didn't say these things entertaining serious doubts about their truth.

But let's place it all to one side. Let's pretend that Micki's views were ill-founded. Let's pretend that there weren't 20 other people who have—had the exact same view that she does. Let's pretend that we didn't have the testimony of Meg Sullivan or anybody else.

The Herald was entitled to report those views. It didn't have to conduct any investigation into the validity of her views. They can—otherwise, the First Amendment—the media—the press shuts down.

Since Mr. Scholz—in order to make an accusation that was to be riveting for the media—and get him a mention on Inside Edition and the rest of it—has accused these women of fabricating, let me—which is the most damaging thing that you can say for a journalist's reputation. It is the nuclear bomb in terms of a journalist's reputation. Let me show you what an outrage this is.

If you wouldn't mind, if the Court's looking at the March 16th article. I've gone over a little bit of this, but let me go through it.

When the Herald interviewed Ms. Delp, something that one doesn't think of, but of course one knows naturally it's true, the newspaper doesn't publish the questions asked by a [1-29] journalist. The report—what the journalist asked doesn't get in the newspaper. All that gets in the newspaper is the responses. So, you don't see what the questions were. You don't see the answers to the questions.

So, when Mr. Scholz sued Ms. Delp back in 2007, he took Ms. Delp's deposition. And from the very beginning, as I've said, she said I absolutely said the words that I'm quoted as saying there in Paragraphs 2, 3, 4—and if we did this correctly, 17. I said those words. They're absolutely mine.

She was then shown the lead by Mr. Scholz's lawyer at the time, which of course doesn't have any quotes. And she was asked, did you say those words? She said, no, I never—I absolutely never said those words. Of course she didn't.

And she was shown Paragraph—I think it is 15, which doesn't quote her either. And she said—she was asked did you say those words? She said, no, I absolutely never said those words. Of course she didn't say those words. There are no quotes there.

Well, three years after the articles came out, two years after that deposition, they filed this riveting complaint, which accuses the Herald of fabricating the lead because the Herald—because Micki Delp never used the words in the lead. That's the fabrication allegation. [1-30] That's it.

So, we take her deposition and she says, number one, again, I said everything in the paragraphs that quote me. Everything verbatim. And as for the lead and the other paragraph, I was never asked by Scholz in that deposition if they reflected my view. They did reflect my view.

You've got the transcripts. You've got the excerpts.

The Herald got it right. Even though I never used those words, I did convey the substance of what the Herald says I conveyed. It was my opinion then. It's my opinion now.

It's based, by the way, on the conversations that I had with Brad Delp, to whom I was married for 16 years, and with whom I was a close friend for 30 years.

So, so much for the fabrication allegation, which is itself a fabrication, which is why I've said it's a disgrace.

So, if examining the three articles statement by statement is not enough, and if the collateral estoppel effect of Judge Cratsley's ruling and the guidance effect of the ruling, where you don't have collateral estoppel is not enough, and if the decisions of the Appeals Court in *Driscoll*, frankly, and in the Eighth Circuit's analysis in *Gacek* aren't enough—and there are plenty of cases that stand behind *Driscoll* that stand for the same—the [1-31] proposition that we have said, then we ask you to look as a whole at what Micki Delp said, the ten times she said that the quotes are exactly what I said, and the eight times that she said yes, that it conveys my opinion, over and over and over again.

Now, I'd urge you to place the boxes aside; and in the same way, let me urge you to put aside—place

aside a couple of issues, which for our purposes are not immaterial—or not material.

As I've said, there's testimony from about 20 separate people about what Brad told them in the last days and weeks of his life, about his loathing of Scholz, his fear of Scholz, his feeling that he had been abused by Scholz, to a considerable degree his anger at himself for his perceived feeling that he could not stand up to Scholz, his anxiety about going out on that final tour.

They include his doctor, who he visited six weeks before he took his life, and told that Scholz was increasing his anxiety and that he had to get out of the band. That's what Brad Delp tells his doctor six weeks before he takes his life.

In Scholz's reality, in the world occupied solely by Mr. Scholz, Brad Delp actually thought the world of Tom Scholz. They were close friends. Brad liked—wanted nothing more than to spend time with him. He was looking [1-32] forward to going out on tour.

For purposes of this motion, let us assume—I ask you to assume that Mr. Scholz's reality is reality. Disregard any dispute about the 20 people who testified under oath about what Brad Delp told them how he felt about Scholz, and Scholz. It doesn't matter.

Similarly, it does not matter what led Brad Delp to take his life, or why Brad Delp took his life. What was in the mind of a now deceased person, as I've said, that caused him to make the decision to take his life, is inherently speculation. It's incapable of being proved.

Many of those closest to Brad believe it was his feeling that he had been beaten down by Scholz and

couldn't stand up to him and was letting people down, that led him to take his life shortly before the tour.

Scholz believes it was this camera incident with Meg Sullivan that caused him so much shame, an incident that its undisputed the Herald knew nothing about until 2011, and an incident which Mr. Scholz urged upon Judge Cratsley when they tried to get Judge Cratsley to deny summary judgment, which Judge Cratsley didn't buy.

Meg Sullivan, for her part, believes that the camera incident had nothing to do with it, but it was his feeling, as he described it to Meg, that he was like an abused dog who could not summon up the dignity to stand up to his [1-33] abuser, and that he was, quote, unquote, "a wimp."

Others believe it was a longtime depression that was a factor.

It doesn't matter. It doesn't matter why. It's unknowable. The only issue before the Court is whether these articles meet those tests.

With your permission, let me begin to walk you quickly now through the March—through the articles, beginning with the March 15th article, which the Court should have with the numbered paragraphs.

The headline of the article is "Suicide Confirmed in Delp's Death." That's factual.

As is the first paragraph.

The second paragraph quotes the family's statement. Doesn't blame Scholz. Simply says he was very tired.

The third is factual and says that he left two suicide notes, and affirming that the police had no idea why he took his life.

Paragraph 4 is a quote from one of the people the

Herald interviewed, simply saying it was sad.

Paragraph 5 says, quote: "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 breakup of Boston, pulled from both sides by divided loyalties."

[1-34] Number one, compare this to the statements that Judge Cratsley has already ruled in the next day's article were not actionable.

It doesn't say that Scholz was the cause of Brad's death. It doesn't mention Scholz's name, let alone defame him. It reports what friends say may have driven him to despair, which by definition cannot be a statement of objectively verifiable fact. It's an opinion.

Just as Judge Cratsley ruled that each of the six statements in this article the next day were about Brad's mental state, this is not remotely actionable.

Paragraph 6, far from blaming Scholz, says rather generously as it turns out, that Brad, quote, "remained on good terms with Scholz." Certainly doesn't defame Scholz.

Paragraph 7 says that Brad tried to please both sides. That doesn't blame Scholz.

Paragraph 8 quotes somebody who spoke to the Herald. It isn't the Herald saying this. If you look carefully at Mr. Scholz's papers, they omit the quotation marks. They're quoting somebody. They're quoting Ernie Boch, Jr.

The person who told—we say that pressure, whether somebody was feeling pressure, isn't actionable; but supposing that wasn't the case, the person who told the Herald that Tom made Brad do the Boston stuff and the others were mad says he didn't view himself as a source for the [1-35] article, but indeed he did speak several times about Brad Delp's death to Gayle Fee and Laura Raposa, told them the views of Delp's family and friends, definitely told them what Barry Goudreau had told him, and that the article is, to use his lawyerly phrase, "right on."

There isn't any dispute about what Barry Goudreau's opinion was, because we have his indisputable email that he actually sends to Tom Scholz on March 16th expressing his view.

With the Court's permission, Mr. Lipchitz will hand up a copy. We're all familiar with the case—with the email, but—I'm not going to read all of it. He says:

"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, Fran Cosmo and his family, as well as many other people you've worked with over the years."

He says further down: "The situation regarding the Doug Flutie show and Cosmo's dismissal were especially difficult for Brad, and the prospect of another tour weighed heavily on him. Brad's feelings about this were not something only the family was privy to. Even Brad's non-musical friends knew his feelings about the upcoming tour. Tom, you abused Brad. We could not keep it under wraps any longer."

[1-36] So, Paragraph 8 doesn't represent a statement that Scholz is responsible for Brad's suicide. The Herald doesn't say it. Ernie Boch doesn't say it.

The Herald quotes Ernie Boch expressing his opinion about Brad's state of mind as related to him by Barry Goudreau. And you can see Barry Goudreau's opinion.

It doesn't matter whether Boch thought that he was speaking off the record, and it doesn't matter whether he regarding himself as a source.

Newspaper reporters, of course, don't ask people they're interviewing will you be my stipulated-to source for this? They interview them.

There's no genuine dispute that he told the Herald this opinion; and there's no dispute that it was in fact Barry Goudreau's opinion, because you're looking at his email which is contemporaneous.

Paragraph 9 is simply factual, isn't of and concerning him, doesn't defame him.

Paragraph 10 doesn't blame him. It simply says that he's a perfectionist, which is not exactly defamatory. And that his well-chronicled control issues led to delays between albums 30 years earlier.

Saying that he had control issues, number one, is far too vague a statement to be actionable. And having control issues 30 years earlier is not saying—that led to delays [1-37] in albums is not saying he's to blame for Brad Delp's death.

Paragraph 11 simply recounts the historic bad feelings between Scholz on one hand and the other original members on the other. It doesn't blame Scholz for Brad Delp's decision.

But more significantly, if I can ask you to take a look at Mr. Scholz's allegation complaint in this case, Paragraph 14, in this—of his own complaint in this very case says, quote, "well-chronicled past differences between Mr. Scholz on one hand and Messrs Goudreau

and Hashian on the other, resulted in a complete breakdown of any relationship between the former bandmates."

How is that a false statement? That's exactly what Mr. Scholz alleges in this complaint.

It goes on—out of its way, the Herald does, to say, "Delp tried to keep peace with both sides and continued to perform with Scholz."

This hardly states that Scholz is to blame for Brad Delp's death, any more that it says that the others with whom he tried to make—keep peace are responsible.

Paragraph 12 doesn't blame Scholz, and is on its face speculation. It says, "The never-ending bitterness may have been too much for the sensitive singer to endure."

It's not a statement about Scholz. It's not a statement accusing him of being responsible for Brad's [1-38] death. And like Judge Cratsley's ruling son the March 16th article, it reflects his mental state or perception of his mental state at the time of his death.

The next sentence refers to ugliness in the relationship between the two sides, and refers to what sources have said.

Well, Mr. Scholz himself says that there was ugliness between the two sides. You just saw it in Paragraph 14 of the complaint.

Now, there's a description of his reaction to the Flutie concert. For the life of me, I don't know if that's still one of the things which they're saying is actionable or not; but let's assume that it is.

Put aside, as we've said, the fact that there are 15 people who've testified under oath about what Brad

told them was his reaction to the Flutie concert. Put it aside, along with the rest of the boxes. All I want to do is show you Brad Delp's own email.

I'm not going to read it to you. I'll leave it with you. He wrote an email on November 16th describing his reaction to the Flutie concert.

And at some time that is convenient to you, we ask you to simply compare what Brad Delp himself wrote in that email with what the Herald said that sources had told them. And ask yourself, if you will, if the Herald is fabricating [1-39] anything.

Paragraph 13 says the Delp family didn't invite Scholz to Brad's funeral. That's obviously a true statement. The Brad Delp family did not invite Tom Scholz to the funeral. It's just a matter of fact.

Paragraph 14 quotes Scholz's publicist, at her request not disclosing that it was her, telling the world in her words, words chosen to put Mr. Scholz in a positive light, "Brad and Tom were the best of friends."

It's nonsense, of course, as it turns out. But that's the Herald quoting a positive side from Scholz's point of view. It's not exactly defamatory.

Paragraphs 15 and 16 quote a recent interview that Scholz had given, stating again, rather generously to himself, that he and Brad were friends and had a deep bond. But the Herald quoted it.

Paragraph 17 simply recounts the details of the finding of the body.

Paragraph 18 says that friends were surprised at the timing, saying they were planning to tour with Boston.

That's hardly accusatory of Scholz.

It goes on to say that Brad had a dark side, which again suggests that he had a depressive nature; that it was his nature that led to the suicide.

Paragraph 19 quotes friends saying that Brad was a sad [1-40] character, and there was nothing they knew of that would lead to the thought Brad would take is life. In other words, nobody knows why he took his life. It doesn't blame Scholz.

And the last two paragraphs are inconsequential.

Where is the false statement of objectively verifiable fact of and concerning Scholz that states as a matter of fact that Scholz is responsible for Brad's death? It doesn't exist.

Well, they say, what about this? It leaves an overall negative impression of Scholz, a bad gestalt, and overall innuendo in the aggregate can take the place of actionable statements—actual statements.

Well, first of all, no it can't under the Massachusetts Appeals Court's decisions in *Mihalik*. But for one thing, it's the natural meaning of the words that govern. You can't pile inferences with—the First Circuit put it, "inference upon insinuation upon innuendo, and enlarge the natural meaning of the words."

But even if you could, the *Mihalik* case says in a public figure, you cannot do innuendo in the aggregate. This is—we have a company of *Mihalik* for you, and will provide it to you. But what it says is that there has to be, in the case of a public figure, an actual, identifiable, actionable statement, if you're a public figure.

[1-41] If there is, then you can get over the bar. But if there isn't, you cannot. It establishes this case—the

Appeals Court case does, what is required and what's not permissible in a public figure case.

In that case, the Superior Court found—ruled before trial that there were no actual, identifiable statements of fact, but nevertheless gave it to the jury—denied summary judgment, gave it to the jury on the basis that they could find innuendo in the aggregate, in effect.

And the Appeals—and the plaintiff—the jury came back for the plaintiff. And the Appeals Court reversed, said no, you're a public figure, given the First Amendment, you can't invoke the overall innuendo of an article that doesn't contain any actual, identifiable, actionable statements of fact.

You can't say well, there's actually no statement that I can point to, but the overall je ne sais quois of the article is defamatory, and therefore we'll just throw it out there and see if they find it.

In other words, you can't take—if you're a public figure, you can't take a collection of non-actionable statements and come out the other end with an actionable article.

Well, Mr. Scholz says, this case, it's not applicable because *Mihalik* involved a public official and not a public [1-42] figure. No. The constitutional analysis under *New York Times vs. Sullivan*, and every one of these cases, it's exactly the same.

The analysis for what's required of a public official, and the analysis for what's required of a public figure, is exactly the same.

So—by the way, so the *Mihalik* case takes away this notion that you can disregard the fact that there are

no actionable statements, and simply say well, there could be an innuendo. You can't do it under *Mihalik*.

But second of all, even if you could, another case we'll leave you with is the First Circuit's decision in *Lambert*, because it's the analysis—*Lambert vs. Providence Journal*. It's the exact analysis, which depending on how far you get into this analytical process, we'd ask you to go through.

That's a case that's decided under Rhode Island law, pre-*Mihalik*, and involved a private figure. So, the rule that I just said didn't then apply.

So, what the Court did is examine the whole article —the totality of the article, to say can this reasonably be construed as accusing the plaintiff of defamatory wrongdoing? Can you invoke a defamatory innuendo theory here?

And by the way, said the First Circuit, it doesn't [1-43] matter that you have people who say that they read it that way. That doesn't cut it. The constitutional standard is, is it reasonably construed as conveying defamatory wrongdoing.

THE COURT: Okay. Now, Mr. Robbins, you've only got a couple minutes left, so—I know that you're not going to be able to get to your IIED complaint, that issue today, so I just want to give you fair warning so you can—

MR. J. ROBBINS: All right.

THE COURT:—bring it towards a conclusion.

MR. J. ROBBINS: So, I'm going to just to the actual malice. So, I'm going to ask you to look at *Lambert*. I'm going to ask you to apply the collateral estoppel effect and the side effects, in effect, of Judge Cratsley's ruling.

The three reasons before I get to actual malice in short are the independent review of the articles, the collateral estoppel effect, and the fact that it's opinion as a matter of law—not actual opinion.

So, if they can get over hurdles one through three, they would have to show that there is evidence—clear and convincing evidence, that the Herald published this with actual malice. Well, they can't, of course, because she's—they published what Micki Delp said, statements which are not of and concerning Scholz, not defamatory of him, and not uttered with actual malice.

[1-44] So, they're dead. Unless they can come up with some hodgepodge of theories which gets you to say oh, I'll just send it to a jury. There are three bases that they use for trying to get to actual malice.

One is they say oh, she didn't like him. They publish non-defamatory statements, but she didn't like him; and so the fact that she detested Scholz means that it's actual malice.

No. It's not. As a matter law, it is not. Whether or not Micki Delp hated him, detested him, feared him or loved him is irrelevant.

By the way, virtually nobody in the 40 years that has dealt with this band liked Tom Scholz, but as a matter of law, it doesn't matter. It doesn't mean—it doesn't establish actual malice. And the cases say that.

Number two, bias. Bias, as a matter of law, does not, cannot constitute actual malice. Because everybody who gives an interview has some bias. There is no evidence that she was biased. The statements don't even apply to her, says Judge—ruled Judge Cratsley, so what's the bias argument anyway?

Finally, the destruction of notes here. That is the principal argument for supposedly trying to get around the absence of actual malice. And they cite the Murphy case, saying that destruction of notes give you actual malice.

[1-45] Here's the problem. In *Murphy*, the notes—there was evidence that the notes were destroyed right after Judge

Murphy's lawyer contacted the Herald.

Here, in three years, Scholz never contacted the Herald to complain—to say that the article was erroneous.

I repeat. In three years, there was no claim by Scholz against the Herald that give me a retraction, you quoted her inaccurately, you fabricated something, something was wrong. Nothing.

So, there is no—there was no duty as a matter of law.

THE COURT: But aren't the plaintiffs going to say to me that Micki Delp—

MR. J. ROBBINS: Yes, they are.

THE COURT:—contacted them, and that that should have put them on notice?

MR. J. ROBBINS: Yes, they are. But as a matter of law, it doesn't. I quote, number one, the SJC decision in *Fletcher*. If I'm lucky enough to be able to find it.

She is a third party. A third party, as a matter of law under *Fletcher vs. Dorchester Mutual*—thank you—the fact that a third party has an issue—by the way, I'll tell you about what happened with Micki Delp in a second, but let's assume otherwise.

"Persons who are not themselves parties to litigation [1-46] do not have a duty to preserve evidence for use by others." Period.

So, the fact that Micki Delp calls the Herald and says—not that you quoted me incorrectly, but that Mr. Scholz is complaining because he is saying that I effectively accused him of being responsible, will you talk to people and make it clear that I never said any such thing?

The Herald says of course you never said any such thing, and they dutifully say Micki Delp never said any such thing. That's March 24, 2007. That's about three years—a little bit less than three years before all of a sudden Scholz sues the Herald.

They're dealing with a computer system which was virtually from the second Eisenhower administration, which as you may have seen from our papers, was purchased antiquated in the 1980s. It has less storage capacity than a cell phone does now. And it broke down all the time.

But if actually—despite all of that—if they had been—if Scholz had said we think there's—as happened in *Murphy*, we think there's a claim, we think you got the notes, preserve the notes, despite the fact that it was an antiquated system, they would have to say antiquated or not, we're not going to overwrite.

But Scholz never contacted them to say that. There is one letter, a year later, sent to the Herald's lawyer, not [1-47] saying you got anything wrong in the article, but complaining because the Herald published something about the litigation between Delp and Scholz.

THE COURT: When was the destruction of the notes? MR. J. ROBBINS: We don't know. You say destruction. That's actually—

THE COURT: A loss.

MR. J. ROBBINS:—with all respect—no, it's an overwriting—the notes are taken and it's overwritten —we don't know when it was overwritten. There is no evidence.

THE COURT: So, there's no affirmative act that's demonstrated—

MR. J. ROBBINS: Well, we know that it was before 2009. We know that, because when the—in connection with the Delp case, Scholz subpoenaed the Herald, the notes did not exist any longer.

But you don't even need to get to all of that, because here is one—and the final point I'll make—fact which eviscerates this destruction of notes theory as a matter of law.

The very first case that the SJC cited in *Murphy*, in discussing spoliation of notes, where you have been put on notice by the plaintiff that the plaintiff said what you said was inaccurate, is a case called *Chang*. Very first [1-48] case.

And the *Chang* case is one of a series of cases that holds that where there is agreement between the person who was interviewed and the reporter about what the interviewee told the reporter, and there's therefore no dispute about what was actually said, you don't have any actual—it can't be actual malice because it's a moot point.

What difference does it make? Micki Delp says the quotes, they got it right. The Herald says the quotes, we got it right. So, as the *Chang* case says where

there's concord, is the way they refer to it, where there's concord or agreement between the interviewee and the journalist, you don't get to rely on some destruction of notes theory to get over the fact that you don't have any evidence that the newspaper published what was said, believing it was false.

In other words, we know that there's no evidence that the Herald published what it reported knowing it was false. Of course we know that. A, they printed what Micki Delp said. B, it wasn't even about Scholz. And C, Judge Cratsley has already ruled there wasn't any actual malice. So, we know that.

So, they're saying well, can we just get around that requirement by saying the destruction of notes.

The absolute last point.

THE COURT: This has got to be the last one, Mr. [1-49] Robbins.

MR. J. ROBBINS: There is. It isn't as though there isn't a piece of paper that still exists that reinforces Micki's testimony and the Herald's testimony that what the Herald quoted her saying was accurate. There is. There is. There is one piece of paper, thank God.

It's an email that you should have in there—and we'll give it to you—that Gayle Fee sent to Mr. Scholz's publicist right after getting off the phone with Micki Delp. Right off.

And it says—it says what Micki Delp said. And it actually gives Scholz the opportunity to give a comment, which he does, and they quote.

So, we do have a note, a record of the conversation in writing. It's what—it's the contemporaneous email that Gayle Fee sent immediately thereafter.

For all of those reasons, four sets of reasons, we're entitled for summary judgment, finally, on this defamation claim.

THE COURT: Thank you, Mr. Robbins. Okay.

So, Mr. Robbins got started at exactly quarter after 2:00. That means he's gone almost 55 minutes. So, I assure you—

MR. CARTER: Thank you for your indulgence, Your Honor.

THE COURT: You have the same amount of time, Mr. [1-50] Carter, should you need it all.

MR. CARTER: Thank you. If I could pull this up?

THE COURT: Sure. Go right ahead, sir.

(Pause.)

MR. CARTER: Well, good afternoon, Your Honor. Thank you for the time. I don't speak as quickly as Mr. Robbins, so I hope I can fit it in in the same amount of time. I appreciate your indulgence.

I'd first just like to start with the general proposition from a Supreme Court Case called *Milkovich* from 1990 which sets forth the importance of a defamation claim, why we have it.

And the Court said, "Society has a pervasive and strong interest in preventing and redressing attacks upon reputation."

The Court stated, "The 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."

And they went on that "while a defamation action is imperfect, it is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored."

That is what has happened here, Your Honor, despite the [1-51] rhetoric and the emotion from the Herald. Mr. Scholz's reputation has been savaged by a series of articles in 2007 by their two long-time gossip columnists who write the Inside Track column in The Boston Herald, Gayle Fee and Laura Raposa, who wrote fabricated, reckless and false stories blaming by unmistakable implication and insinuation Tom Scholz for Brad Delp's suicide on March 9, 2007.

Those who read the stories understood with any doubt that the Herald articles targeted Scholz as the culprit in Brad's decision to end his life. And they reported based on supposed inside information, from Micki Delp and other unnamed friends and unnamed insiders—this is from the articles—thereby suggesting that these people were in the know and had some information that wasn't being fully disclosed, but their conclusions is what you see in the articles.

Those sources, including Micki Delp, vehemently denied that they provided that information to The Boston Herald and they denied that it was even true. And I will get to that.

The Herald tries to argue that their stories don't blame Scholz for Brad's decision, but they avoid this radio interview. And while we aren't making the radio interview part of our claim, it is evidence of the state of mind of the reporters.

And Gayle—this is a weekly interview that they were [1-52] doing at that time in 2007. And Gayle Fee went on WRAF on March 15 first thing in the morning to discuss the March 15 article.

And she expresses in that radio interview that she herself had doubt that, you know, work-related conflicts, this band conflict, could cause a person to commit suicide, and yet the article is written.

She concludes that—and this has been entirely on her own—she acknowledges no support for this, no source providing this information to her—but on her own, she says in that radio interview Tom Scholz apparently gave Brad nothing but grief his entire life.

So, very clearly on the day this articles appears she is conveying in this radio interview her own subjective state of mind of doubt about what is conveyed in that article and what gets conveyed repeatedly over the next two articles—in fact, even more forcefully in the next two articles—that this band conflict drove Brad to despair, led him to suicide.

The Court previously found—and this was in reviewing the articles in connection with the motion to dismiss—the Court reviewed the articles and concluded that they are reasonably susceptible of a defamatory connotation because they insinuate, if not suggest, that Delp's stressful career, caused in part or in whole by Scholz, played a role [1-53] in Delp's suicide.

That's guidance, I understand. This court's not bound by that. But that's based on an objective, independent read of the articles.

And just, again, in this introductory statement—I'll come into more detail later—but in the March 15

article, the writers allege that based on alleged insiders stated that Brad was caught in the middle of never-ending conflict between Scholz and several former members who had left the band in the 1980s, with whom Brad had allegedly remained friends.

And those people I think the Court knows probably by this point, but I'll name them, Barry Goudreau, Sib Hashian and Fran Sheehan. The original five touring members of the band were those three, Tom Scholz and Brad Delp. And during the 1980s, those three left. And how they left is discussed in the March 15 article.

And Brad—I mean the writers clearly blame Tom Scholz for that conflict. And this bitter battle that they describe in the March 15 article, Tom Scholz is the culprit.

But even if he weren't described as the culprit, he is one contributing force to that conflict, and that's all you need to shows. We don't need to prove that he was the sole reason, but that he is labeled as a contributing person partly responsible for Brad's suicide, when that wasn't the [1-54] case at all, that is just as actionable and wrong.

In that March 15 article, the Herald says that, quoting an unnamed insider, that Tom made Brad do the Boston stuff. And in doing so, the Herald conveyed that he was under pressure, Brad was under pressure, and could not escape this conflict, which they state later in the article was perhaps too much for Brad to endure.

The insider, there in that paragraph, and the other unnamed insider who they attribute some of this information to, who is Paul Geary—Ernie Boch and Paul Geary—both denied providing information for this article.

And we lay that out very specifically, paragraph by paragraph, in our brief. And if there's time, I will go through that with the Court.

But for the March 15 article, those two are the primary sources for this—for the inside information, and the two sources deny providing it. Paul Geary even says I didn't know about—enough about this band conflict and enough about Brad's reaction to it and had no basis to know if that's why Brad killed himself. I was stunned. I didn't know and I certainly didn't provide that information to them.

So, he categorically denied what they attribute to him in that article. And of course they don't name him in the article, but subsequently they've said that was the person [1-55] who provided it. That's false.

Brad in fact was free to come and go from Boston, and he did come and go. After the first two—and we've kind of jumped right into the thicket of these articles, but I want to back up a little bit for a moment and just say that the band started in the 1970s. Tom Scholz founded it, was the leader of the band, wrote all the songs, virtually all the songs with the exception of maybe one by Brad Delp, wrote all the lyrics, the music, performed virtually all of the instruments on the albums that were actually produced, with the exception of the singing and drums.

He then brought in these other three, Barry Goudreau, Sib Hashian and Fran Sheehan, to tour with them because they needed a band. This was the 1970s. They were going to try to fill huge arenas. They needed a band to go out and play this music and so these three were brought in.

It was a whirlwind time. They had enormous success. That first album of Boston until recently was

the number one selling debut album of all time. I think in the '90s, it may have dropped to number two. But it was an enormous success.

And in the 1980s, there was a falling out after these two very intense long tours. These were tours that lasted over a year, sort of endlessly on the road and performing, and there was a falling out. Barry Goudreau left. [1-56] Ultimately Sib Hashian and Fran Sheehan left.

There were lawsuits. Two of these former members sued Tom Scholz. He countersued. In one case, the last one, Tom brought a suit against one of them, there was a countersuit.

All of this was to resolve their rights in the band. They were resolved quickly, ended by the 1980s. Tom and Brad continued to perform with Boston, continued to have success. Those three were just not part of the life of Boston anymore.

So, this notion of never-ending bitterness, as Gayle Fee said in a radio interview, perhaps if somebody were suffering every day from this bitterness and bad feeling, well, there was no everyday suffering.

Boston was inactive for years at a time. In fact, in the last ten years of Brad's life, seven of those Boston was inactive. They weren't producing an album. They weren't on tour.

So, there were long periods when Brad was doing his own thing. And that's one of the things he enjoyed about being part of Boston is that he could do other things. And one of the other things he did and enjoyed was to play in this band called Beatlejuice. It was a Beatles cover band.

And he did that starting in the '90s. He founded that band with some other friends. And they were playing around and one of them said, hey, let's go do this at a club and [1-57] they did. They enjoyed it and they were good at it. It gave Brad, you know, pocket change, but it's not what he lived on. And the record will reflect that, that the income from Boston is what sustained him. And he had the good fortune and knew he had the good fortune of being part of it and enjoyed it. And that's what the record will reflect.

Coming back to the article. On March 16, the Herald published an article—and I'll just put up one of the chalks just so you can see what it actually looked like—this was the—this was the cover of The Boston Herald that day. "Pal's Snub Made Delp Do It."

That's a definitive statement. And it becomes clear what that means, in the context both of this article and in the context of what was written the prior day about the band, and what was written in prior articles by the Herald.

Everyone knew. The Herald writers knew and had conveyed that Tom Scholz was the leader of this band and controlled the band. This Court said that with the understanding that Tom Scholz had the power to disinvite someone like Fran Cosmo, it's clear that this is a statement about Tom Scholz and defamatory.

Now, in dealing with the motion for summary judgment and Micki Delp, the Herald tries to build this structure and say that somehow you take that one decision and it completely knocks the Herald out. Well, if that's—you [1-58] look at that decision and it's crystal clear from what the judge was saying in there, because he says it explicitly, that he's not saying this decision applies to the Boston Herald. He says in that

decision it is the—he says first of all Micki Delp doesn't name Scholz. So, you just, if you look at those six statements, no, it's not named, it's not these broad statements about the band and things that would implicate Scholz.

But he says 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.

That's from Judge Cratsley's decision in the motion for summary judgment decision. So, he's very clear that this does not govern, this is not collateral estoppel or meant to be collateral estoppel.

And he goes on and says in describing the articles, he says the Herald article quotes Micki as saying that Brad was upset that Fran Cosmo had been disinvited from the tour, and then, quote, "Scholz who denied any unhappiness on Brad's part because of the exclusion of Fran Cosmo, and the Court then writes, "The Herald writers immediately follow Scholz' quote with nonetheless suggesting a possible connection between Scholz and Brad's suicide."

And the Court also then says, "And later in the Herald [1-59] articles the writers state that Micki said that Brad was upset over the lingering bad feelings from the ugly breakup of Boston."

The Court writes, "The Herald writers strictly on their own explain that Brad continued to work with Scholz but also worked with Goudreau, Sheehan and Hashian who had a fierce falling out. Then the Herald writers add—again possibly seeking to create a connection between Scholz and Brad's suicide—as a result Brad was constantly caught in the middle of the warring factions."

So, in this decision the Court is focused only on the March 16 article. And even if you focus just on the March 16 article, you can see that it's the Herald writers who take these statements, the four quotes, and then they fabricate on top of that—which I'll get to what Micki said—and they add in all of this other stuff, how the article is structured, the language linking Scholz to it. Scholz is the only person in the band who is named conveying that Scholz is the person who would make the decisions or certainly one of the people who would make the decision to disinvite Fran and, therefore, Scholz is responsible. That's the message. And that's what Judge Cratsley points out in writing that decision.

Then if you step back and you look at March 15 and the way Scholz is described there as the one who controls the [1-60] band, the one who has so much power he apparently can force Brad to do things, make him do Boston. That's not explained, but that's clearly the result of that statement.

He's described as the one who makes decisions about the type of music, the release of music. He's described as the one who in November of 2006 can have his people call and arrange for Boston to perform at the Fleet event.

Again, Scholz, no other band member is identified as making all these decisions. So, clearly readers understand—if they didn't know already about this band—they understand from the Herald that Scholz is the person who is making decisions for the band and who would be the one disinviting Fran Cosmo, which supposedly led to Brad's suicide, and who was the one causing this band conflict which supposedly led to Brad's suicide.

THE COURT: Well, let me ask a question. Because Mr. Robbins would say to me that those comments that Judge Cratsley attributes to the Herald writers are statements of opinion based on disclosed facts now decided to be non-defamatory by Judge Cratsley.

And, therefore, that while Judge Cratsley is not ruling exclusively on the Herald writing, nonetheless, that's the conclusion that can be drawn.

MR. CARTER: Well, what he writes about that in the motion to dismiss where he addresses that issue, he says [1-61] without reaching whether these are—whether this is a fact or opinion. At the very least—

THE COURT: It doesn't address—

MR. CARTER:—he finds that it's a mixed opinion, which the Court addressed in—earlier in this session with the Herald's attorney. And the mixed opinion is where it's a statement of opinion that suggests the existence of undisclosed facts.

So, in this case, there's a statement by Micki Delp, who supposedly says he's driven to despair because of the disinvitation of Fran Cosmo. She is described as the ex-wife of Brad Delp, somebody who would be in the know. There's a suggestion that she has information that hasn't been disclosed that supports that statement.

That's at a minimum a mixed opinion. We say it's a fact statement that can be proven false, but it's at least a mixed opinion.

Furthermore, the Herald wrote—with respect to that statement—the Herald published on their online edition on the evening of March 15 that Micki Delp had received a suicide note.

So, readers who were following this would have known not only did the Herald say she was the ex-wife and a person in the know, but she had received a suicide note. All of that would further the impression of undisclosed facts and, [1-62] therefore, support that as a mixed opinion.

That is actionable. And I think the Court understands that, and that's laid out in our brief. We had a discussion of *Driscoll*, which the Court correctly analyzes, and also the restatement which lays out why a mixed opinion can be very damaging, just as damaging as a defamatory fact statement.

THE COURT: Let me ask you one other thing because—

MR. CARTER: Yeah.

THE COURT:—it's on my mind and while I've interrupted you. You started your comments to me by saying that the Herald had blamed Mr. Scholz for the suicide of Brad Delp, and your words were by insinuation and implication.

And, so, you are suggesting that I can draw conclusions from all of the evidence and all the inferences that various people around the situation drew from it, as opposed to simply looking at the words that are written in the articles and doing the analysis as Judge Cratsley appears to have done, without really looking at the full context, but just looking at the language. Do you want to comment on that?

MR. CARTER: Well, I think you can do both, and I think the Court should do both. I think we can establish that there are provably false fact statements in these articles.

But the SJC has been very clear, as have others courts, [1-63] that you must review an article or publication, in this case a series of articles about this subject in their totality, so that you would take from the flavor elsewhere in an article or a statement elsewhere in the article, such as Judge Cratsley did where in March 16 he says, well, they've identified Scholz in the rest of the article and they've linked Scholz to the statements, that's what I mean by reviewing it in the totality.

It's not, you know, one line only. It's what leads up to that line. For example, you know, in the March 15 article, there's a line that says—and I want to get it right, so, let me just pull that out—it says, "But the never-ending bitterness may have been too much for the sensitive singer to endure."

That's one sentence. But if you look before that, you understand why that is a problem. And that is, their statement that Brad is caught in the middle. Their statement that Tom made Brad do the Boston stuff, even though Brad came and went from the band as he chose.

The statement that Scholz had penchant for perfection and well-chronicled control issues and that the others as a result left. So, he's being described as the tyrant. He's being described as the guy who has got, you know, Brad all locked up.

And then they say—after creating that impression—[1-64] they say, "but the never-ending bitterness may have been too much for the sensitive singer to endure."

And clearly from that they are describing Tom Scholz as the principle driving force of this alleged problematic relationship which they claim led to his suicide.

Now, while that statement says "but the never-ending bitterness may have been too much for the sensitive singer to endure," they say "may have." Well, that morphs over time. And you get the March 16 article where Micki says—according to Micki—she's quoted in Paragraph 15—"According to Micki Delp, Brad was upset over the lingering bad feelings from the ugly breakup."

She categorically denies saying anything like that. And that was in her 2008 testimony. The jury is entitled to accept that statement.

But then jump to the July 2nd article. July 2nd they write, "The parties, founder Tom Scholz and original members Barry Goudreau, Sib Hashian and Fran Sheehan, with Fran Cosmo on vocals, have been at odds for decades"—and this is the key line—"and the lingering bad feelings from the breakup of the original band more than 20 years ago reportedly drove the singer to take his own life."

It's no longer "may have." Now it's this is what did it, this is what drove him to take his life.

And then if you go to the 2008 article, which again [1-65] it's not one of the three articles that is being sued on, but it's a reflection of the state of mind of the authors. They state in the January 2008 article—would you like a copy of this, Your Honor?

THE COURT: Yes. I think that would be helpful.

MR. CARTER: If you go to the second paragraph from the bottom on the first page, it begins, "Following his death." THE COURT: Yeah.

MR. CARTER: It says, "Following his death, Micki Delp, the mother of his two children, told the Herald that Delp was driven to despair by the ongoing battles

stemming from the breakup of the band in the early '80s."

So, this point about the band conflict causing the suicide is clearly their preconceived theme. They write about it definitively as a factual statement in the July 2nd article. They repeat it here.

And the amazing thing—which this goes to demonstrate the lack of integrity of these writers—they ignore what—their own article. Because on March 16, their own article says according to Micki Delp it's the disinvitation of Frank Cosmo that causes—that's the last straw.

Here, there's not a mention of Fran Cosmo. It's Micki Delp told the Herald that Delp was driven to despair by the ongoing battles stemming from the breakup of the band in the early '80s.

[1-66] This is evidence that they make things up. And this is evidence that they really aren't very careful about what they say.

And it's also important to point out, you know, if they had their notes, we'd be able to establish maybe what in fact did occur during that conversation; but they weren't relying on their notes at this point. And I'll come back to the destruction of the notes.

Let me jump to the—to follow up on your question, Your Honor—the notion of—well, let me go through the articles.

THE COURT: You've got until five after 4:00, if you need that much time.

MR. CARTER: Okay. Thank you.

(Pause; the Court confers briefly with the clerk.)

THE COURT: I'm the pro se judge this afternoon, but apparently the clerks have been good enough to send those matters to other sessions.

MR. CARTER: So, the first test is whether these articles are of and concerning Tom Scholz and whether they are defamatory. Those were the first two tests.

And let me first address—they're a little bit combined here—let me try to first address the of and concerning. And then as I go through it, try to address the defamatory piece as well.

[1-67] But whether articles are published concerning the plaintiff is generally a question of fact. There are two tests. And this is from the *Eyal*, the *Helen Broadcasting* case. That's the SJC case. It's E-Y-A-L.

And the first test is a subjective test. And that test is if there is proof that defendants intended the articles to refer to plaintiff and they were understood as referring to plaintiff. That test is met here.

The objective test separate—meet one or the other and you're good—the objective test requires proof that the defendants words reasonably could be understood as referring to plaintiff.

Well, Judge Cratsley is pretty reasonable. And he already read the articles and determined they could be understood as referring to Tom Scholz.

But let me just walk the Court through the subjective test because there are a couple of interesting pieces of fact that demonstrate they understood they were talking about Tom Scholz.

In the March 15 article, in Paragraph 5—and I've touched on this a little already—they say "Brad was

literally the man in the middle of the bitter breakup of Boston, pulled from both sides by divided loyalties."

So, at this point, they are saying that Boston-related conflict is being set up as the cause of his suicide.

[1-68] Paragraph 6. "Brad remained on good terms with both Scholz on the one side and Barry Goudreau, Sheehan and Hashian on the other." Scholz is now named.

Paragraph 7. "Delp tried to please both sides." Again, this is reinforcing the conflict.

Paragraph 8. "Tom made Brad do the Boston stuff. He was always under a lot of pressure."

Here Tom Scholz is being directly blamed. And again this is a statement that is denied by the unnamed source.

Paragraph 9 discusses the early success of the band, but that things deteriorated. And the article blames Scholz for the deterioration and the band-related conflict.

As I mentioned, they refer in Paragraph 10 to the penchant for perfection and well-chronicled control issues of Scholz.

In Paragraph 11, "Scholz claimed the other band members with the exception of Delp attempted to steal the name Boston."

So, he's being described as a person who is upset and pursuing this conflict.

It goes on, "While the bitter battle raged, Delp tried to keep peace with both sides."

And then Paragraph 12. "The never-ending bitterness may have been too much for the singer to endure."

[1-69] If that's not enough to establish is about Tom Scholz, the March 15 radio interview they say it—Gayle Fee goes on the radio and she says it explicitly.

This is at Fact Statement 744, Joint Appendix, Exhibit 252. This is where the radio interview is fully transcribed. But she says she doubted that someone would kill themself because of job difficulties. She said this couldn't—I thought this couldn't possibly be the reason.

But then she added, once you look at how bitter and ugly and—the feelings still are 20 years later and think about putting up with that maybe every day of your life for 20 years, you know, maybe it could push somebody who is kind of sensitive over the edge.

And she concludes that apparently Scholz caused Brad nothing but grief his entire life. So, again she's expressing in her own mind this article is about Scholz.

The March 16 article talks about on the headline "Pal's Snub Made Delp Do It." Micki Delp denies saying this.

But let me say before this article came out, she, Micki Delp—sorry, Gayle Fee, reaches out to Tom Scholz for comment—and that's in the e-mail that Mr. Robbins referenced—because she knew that Tom Scholz was the person the article was about.

And she says in that I don't want Tom to get more upset, or something to this effect, with your girlfriends, [1-70] the Track girls they call themselves.

So, clearly she understands in her own mind this is about Tom Scholz.

And in fact—let me add also that Kevin Convey who was the editor-in-chief at the time—it's now Mr. Sciacca, but it was then Kevin Convey—he testified that he was concerned the article might harm Tom Scholz personally before it came out.

So, he understood the article was about Tom Scholz and would be harmful to him. That's the subjective state of mind that they had. And part of that subjective test is people understood it was about Tom Scholz. Everyone who read the article—well, that's an overstatement—but those we've talked to, nearly everyone we've spoken to who read that article agreed that the article was about Scholz and blamed him for Brad's suicide.

Micki, herself, testified the March 16 article gave the impression that Brad took his life because of something Tom Scholz did.

Pam Sullivan called the Herald's article a pack of lies and has stated no one had told the Herald Brad did it because Tom upset him.

Even Bill Faulkner, who is a person who has certainly switched colors in this, as have some others like Micki Delp, before the litigation became active, before there was any lawsuit filed, he sent an email to Kim Scholz for Kim [1-71] and Tom Scholz and talked about how Tom was vilified in the press and complained—and this are his words—"the Inside Track ho's spread all kind of" S blank blank T. "Depression is a disease and he did what he felt he had to do. Tom is absolutely not to blame for Brad's death."

I could go on. There are many others who read this articles that way.

The subjective test has been met. The objective test has been met. These articles concerned Tom Scholz and they're certainly defamatory.

A statement is defamatory where it is capable of damaging the plaintiff's reputation in the community. Well, that happened in spades here. People literally did call Tom Scholz a murderer based on these articles.

That was what happened when the Inside Track wrote these articles, these false articles, and fabricated what people said. The result was it got picked up by radio stations. It got picked up by the internet. And people literally on the internet—and we've quoted this for the Court—referred to, you know, Tom Scholz as a murderer. You know, thanks, bleeping a-hole, they write on the internet.

Even the Boston Globe describes the articles as—the Globe wrote an article, "the Herald article suggests that Scholz was to blame for Delp's suicide."

[1-72] I'm not sure what could be more defamatory than being told that you were responsible for anyone else's suicide, much less the suicide of someone that you are identified with professionally, who you've worked with closely for three decades and who you consider a friend.

That would be devastating. It was devastating to Tom Scholz. It has been devastating to him. And it was—on top of that, it was put on the front page of a major paper. And with that kind of splash, it then ripples out through the media channels, radio, internet, et cetera, broadcast TV. So, now it's out there with fans commenting on it, people on the internet

commenting on it with Tom as a murderer. That would be devastating.

The *Gacek*—well, let me address—this court I think has indicated, Judge Cratsley has indicated as well, that the state of mind is absolutely provable. It happens in every criminal case. And this Court understands that, and other courts understand that.

In fact, two cases on this very issue about defamatory articles concerning or implying, insinuating that somebody caused a suicide of someone else have been held by two cases, two courts that we found.

One, the Federal District of Pennsylvania. It was affirmed by the Third Circuit. And another Superior Court case from that state where in the federal case, the Third [1-73] Circuit case, it's *MacRae v. Afro-American Company*.

There's an insinuation in the article that a mother caused her daughter to commit suicide because her mother was extremely displeased over her class standing. That was viewed as defamatory, and that it could go to the jury.

In the case of *Rutt v. Bethlehems' Globe Publishing Company*, there was a newspaper article which could be construed to imply that appellate had in some way caused or contributed to the apparent suicide of his son. The Court held that posed a jury issue as to a defamation claim.

So, accusing someone of causing someone else's suicide is defamatory. Courts have held it as it leads to a jury question. And I submit that that's the case here.

And we—furthermore, as I'll point out, we know—we can establish, certainly meeting the standard of preponderance of the evidence, which is the standard for this, that Brad did not kill himself for the two reasons that the Herald presents to the public in these articles.

And those two reasons are that there was this ongoing, never-ending band conflict and bitterness that drove him to suicide. That's the one they repeat throughout. And there's a second one, which appears in the March 16 article, which is that the dismissal of Fran Cosmo was the last straw that led to his suicide, that caused his suicide. Those are the two reasons. We can prove those are not why Brad killed [1-74] himself.

Just very briefly on *Gacek*. What happened in *Gacek* and why it's easily distinguishable. *Gacek* is a pure opinion case. Somebody, a coworker, said it was—what's the—Mattson I think is the guy's name who reported—who reported Showers, Showers was the guy who killed himself—and Mattson is a coworker, I think a supervisor, he reports Showers to the boss for having, you know, breaching the limited hours, a sort of shortened workday.

Everybody hears about this complaint. This guy Showers goes to the office. Everybody knows Showers has gone to the office. Showers goes home, kills himself. Boom. Then the other coworker states his opinion that, oh, it was Mattson who reported him, that caused it.

Everyone knew what the facts were. There had been this complaint. He'd gone to the meeting. He had gone home and killed himself. Everybody could decide for themselves whether that was a credible opinion or

something to be given weight to or dismissed. That's pure opinion. That's distinguishable from here.

THE COURT: Why? Why?

MR. CARTER: Why is that distinguishable? Because here you have unnamed people who are described as insiders, friends, sources. You've got Micki Delp who is being described as the ex-wife who received a suicide note. It's [1-75] being reported that some people got suicide notes.

So, there is a sense that whoever they're relying on has additional information that would support the statements that are made in these articles.

For example, Tom made Brad do the Boston stuff. Well, there's no support for that statement. There's no way for the reader to assess if that's credible at all or if it's just somebody's crazy notion.

And it was a crazy notion. But there is no basis for people to know that. And the Herald communicates that as some insider saying it. That's the suggestion of additional facts that the reader can't assess. And, so, that happens throughout these articles.

Micki Delp says he was upset because of Fran Cosmo's disinvitation. Well, it doesn't say is that what he said in his suicide note? No. That's not reported. It's just the basis for that statement is not disclosed, so that makes it at the very least an actionable mixed opinion.

THE COURT: Well, let me just stop there with that. I mean, you say the basis isn't disclosed. I mean, it would seem to me that everything the Herald writers had they would have put in the articles.

MR. CARTER: It's not that they disclosed what they had. It's that they wrote it in a way that suggests there

is additional information that these people who made these [1-76] statements have that justify those statements. That's the mixed opinion. So, that the reader cannot assess whether or not the statement is credible.

The reader is led to believe these people have inside information by being close family members, friends, people who received a suicide note or may have received a suicide note. There's an implication they know something that's not being written. And, so, it makes it a mixed opinion at the very least.

THE COURT: I have a sense that this is probably the nub of the issue in the case really.

MR. CARTER: This is—sorry?

THE COURT: I have a sense that this is probably the nub of the case really, as to whether this is an opinion or a statement of fact.

And, so, you just said that the articles are written to suggest that the Herald writers are relying on undisclosed—are people who are in the know and who aren't being revealed in the article.

MR. CARTER: They're describing people who they say are in the know. The only person who is identified who makes a statement suggesting it's band conflict or Fran Cosmo is Micki Delp.

The others who supposedly supply that information are not identified, so the reader doesn't know who they are or [1-77] on what basis they're making those—

THE COURT: But the information is in the article.

MR. CARTER: It isn't. What's in the article is a statement like Tom made Brad do the Boston stuff, but the basis for that isn't in the article.

The statement that Brad was upset and in fact driven to despair because Fran Cosmo was disinvited. The basis is not provided. So, the reader can't know, well, you know, there could be information about the relationship between Brad Delp and Fran Cosmo that we don't know, but we're being told "Pal's Snub Made Delp Do It." And it's supposedly coming from somebody who, it's being suggested, would know.

THE COURT: I'm troubled because it seems to me that it might also—and I have to look at them as carefully as you all have for all these years that you've been working on this case—but that it really is similar to the text of what I assume was a press release in the *Driscoll* case.

MR. CARTER: Well, it's—

THE COURT: Where information is disclosed and that it's clearly—it can be seen that this is an opinion based upon the disclosed information.

MR. CARTER: Well, let me add also from something that the Court wrote in the decision on the motion to dismiss. That the Court wrote, "I find that the statements are, if they are opinion, are based on undisclosed defamatory facts [1-78] and, therefore, actionable as mixed opinions. The column's very name, Inside Track, indicates that it conveys inside information, that is information not available to the general public."

"The articles attribute statements to 'multiple unknown insiders,'" that's in quotes, "as well as Delp's ex-wife Micki. An average reader could presume that because the sources cited in the articles were 'insiders,'" in quotes, "they had close relationships with Delp and would, therefore, have first-hand knowledge regarding Delp's suicide. Presumably these

sources would also have insightful information about Delp's relationship with Scholz and the other Boston members."

"The opinions expressed in the Inside articles as found in the pleadings can be reasonably understood as implying the existence of additional undisclosed facts concerning Delp and Scholz's relationship as well as Boston's breakup."

So, it's as well the context where this is written. It's the Inside Track. It's people who they've gone out and supposedly found insiders who know.

The difference with *Driscoll* is they say in that press release this was a five-on-one situation—which I think the language is from that press release—which by itself is coercive.

THE COURT: Right. It's by definition.

[1-79] MR. CARTER: Which by definition is coercive. So, they are really putting a little limit around what it is that's supporting the statement of that it's coercive. And a reader can assess that for him or herself.

Let me move on, though.

THE COURT: Go right ahead, sir. Sorry to interrupt you.

MR. CARTER: So, with respect to actual malice, which is a key part of this case, there is substantial evidence that the Herald has fabricated these articles and statements in them.

Micki Delp stated—this is about the March 16 article—this is on about the first paragraph in the March 16 article. "The first sentence is totally wrong."

"What part of the first sentence did you say to Gayle Fee?"

"Nothing, not one word of it."

Then she testifies about the—I think it's Paragraph 15 in the article where it attributes to her. It says, "Brad was upset over the lingering bad feelings from the ugly breakup of the band over 20 years ago," which they say according to Micki Delp.

"And I didn't say that," she says. "That's someone's assumption."

"Did you say anything similar to that?"

[1-80] "No, not a word."

She then calls the Herald, Gayle Fee, the next day, March 16. She's furious, she testifies. And she says, Gayle, you know, I'm stunned by what's in the paper today. You know I didn't say this. I suggest you contact your legal counsel and straighten that out, because that's not what I said.

And in her testimony, she talks about being furious. And people who testified, Gary Peale, Paul Geary, Pam Sullivan, all describe Micki Delp calling them immediately, literally half hysterical saying I didn't say this. I didn't blame Tom, Tom's not to blame.

And for them now to say that, oh, well, she thought it was that the Herald was saying she used these precise words, but she meant it, she meant exactly that, but she didn't use those precise words, respectfully, that's not—that's not credible.

And I think a jury will be able to determine and I think the Court will determine that, but a jury is entitled to determine, well, is Micki Delp from 2008 credible? Is that the testimony we believe? In which case, it's fabricated, fabricated statements.

Or is it her completely different testimony in 2011, after she's had literally 1400, over 1400 telephone calls with the Herald's counsel, and her joint defense agreement.

[1-81] They're writing the briefs for her. So, this is a jury question.

But if you believe, as we're entitled to the inference, the testimony from 2008, the Herald writers fabricated these statements.

They also fabricated the statements from Paul Geary and Ernie Boch, who say they didn't give the information in the March 15 article. That's further proof of fabrication.

Fabrication by itself IS—constitutes actual malice. At that point, that piece of what's required of Tom Scholz is established.

But even if the Court wanted to go further and look beyond the fabrication to recklessness, the Court needs to look at *Murphy*. It's the SJC case. The Court knows about it. That case determines the outcome here if the Court goes to recklessness.

Destruction of notes. It's the same situation here. In *Murphy* that was shown to be—to demonstrate actual malice. In *Murphy*, a lawyer called and said you misstated what Judge Murphy said. He didn't say that. There's no threat of a lawsuit. That's all the lawyer said, according to that case.

Here, Micki Delp calls the very next day. Says, I didn't say that. She was furious. Call your legal counsel. Subsequent to that, the notes are destroyed by an [1-82] affirmative act. The Court asked was there an affirmative act?

THE COURT: What's that? What's that?

MR. CARTER: Well, there was at least one affirmative act. And that is if you wade through all this paper—I apologize for the amount of it—but there's this thing called a spike queue in this antiquated system—

THE COURT: What's the name of it?

MR. CARTER: Spike queue. I don't really know what it is, but you have to press a button to send your notes, your article, into that queue in order to get overwritten.

That's an affirmative step right there.

Furthermore, you can print it out, okay? And in fact you'll see from the record, when it concerned them—there was an article that was written about them that detailed the reckless manner in which they do their reporting. They had an email from that author. It was in the Boston Magazine from 2006. What did they do? Printed it out, they still have it.

So, if—there's something that they could have done here, they could have just printed it out, save these, that was their obligation. And it was their obligation because they knew of the potential for a lawsuit.

What Tom Scholz didn't know at the time is he didn't know that Micki said to the Herald you made it up, I didn't [1-83] say that. So, he had the impression, oh, Micki is the one who is saying this. So, he's aimed, he's thinking I've got a problem with Micki, and sends her a demand letter.

The Herald actually writes about the demand letter on March 24th. They have it by March 23. So, they're aware of the very good possibility of a lawsuit within six days. And they still don't save their notes.

And they should know that that lawsuit is going to eventually come to them when Tom Scholz learns that Micki didn't say this, that the Herald made it up.

So, they had every reason to know and had an obligation to save those notes. They destroyed it, that's actual malice.

Murphy talks about relying on a biased witness. The night that she talks—Gayle Fee talks to Micki Delp, that's March 15. They talk for a minute or so says Micki in her testimony. And from that you get a front page article.

And Gayle Fee then emails Gail Parenteau, who is Tom Scholz's publicist, says, you know, Micki says Brad is driven to despair because of Fran Cosmo being disinvited. Does Tom want to say anything about that?

And this is right here. This is the first part of that email. And then Gail Parenteau writes back immediately, "Re Micki Delp says Brad was in despair. Please do not print unless you see this with your own eyes. She apparently has [1-84] some vendetta and agenda. I will elaborate."

They get on the phone, Gail Parenteau and Gayle Fee. Gail Parenteau relates a telephone conversation that she had with Micki Delp, I think the night before where Micki Delp is ranting and raving about Tom Scholz and saying how she's going to go after Tom Scholz, and that's communicated to Gayle Fee.

And Gayle Fee—and Parenteau says to Gayle Fee, don't run these unless you see this, the notes, with your own eyes.

Because everybody knew at this point that there were suicide notes. So, she's saying to the reporter don't rely on this, she's not credible.

Well, that's exactly what happened in the *Murphy* case. The reporter relied on a known biased witness and didn't test the veracity of that information and that's what happened here. There's a reliance on a known biased witness without any testing of the veracity of those statements. They run with it without regard for the consequences to Tom Scholz. That's reckless and that's actual malice.

I know I'm running out of time.

THE COURT: Yes, you've just run over by about two minutes. But I slowed you up there. Is there anything else you want to tell me?

MR. CARTER: Yeah. Let me—

[1-85] THE COURT: I'll give you until ten after, but then I really have got to finish.

MR. CARTER: I'm sorry? Let me quickly just review my notes here. This is all laid out in our papers. I know the Court knows that.

There is something here that—well, you'll see it. It's they wrote the article based on a preconceived agenda. And that's another factor to consider in terms of actual malice.

What they knew about this from having reported about the band in the past was there had been a breakup in the 1980s, there had been lawsuits, they'd written about that. That was old news. But that's what they knew.

And then that briefly resurrected itself in 2002 because there was going to be a TV show, sort of a biography about the band, called VH1. They were going to do a Behind the Scenes about this band. And they interviewed some of the band members, Sib

Hashian, and, you know, who expressed all these bad feelings about Tom Scholz. Sib Hashian did.

They actually talked to Brad Delp in 2002 about this. Brad said about the band conflict I'm proud that I remain neutral and that I remain friends with these people. He didn't express any conflicts, stress, despair.

What he expressed and what they knew was he was proud. They ignored that and they ran with the only thing they knew [1-86] which was band conflict from 20 years ago. And, so, they actually—when they interviewed people, and Micki Delp testifies to this, she says they tried to get me to say it was about band conflict.

Well, in the chalk I showed you she said I didn't say that or anything like that. That's actual malice.

You know, it's amazing I've gotten to this point and I haven't had a chance to really address falsity. But the Court will see the evidence and the Court will see—which wasn't mentioned by the Herald—but it's sad.

The flip side of this case is there's a real human tragedy here, which is Brad Delp. I don't want to overlook that. And I'm sorry I have to get into this, but that's caused not by my client, but by the Boston Herald and the Inside Track.

Brad Delp, nine days before he killed himself, was discovered to have put a hidden camera in his fiancee's younger sister's bedroom. She discovered that. She confronted him. She fled the house. She didn't return until the day of his suicide.

During that period, there are emails back and forth which the Court will see. They are heart-wrenching. Brad Delp is beside himself with feelings of shame and

remorse, talking about how he couldn't feel worse about himself, he's not worth anything. Talking about this most grievous sin [1-87] that I've committed against you, Meg Sullivan. Don't tell Pam. And fear that Meg Sullivan has that Brad will hurt himself.

Unfortunately, that's what happened. Pam Sullivan testified that she was also concerned that Brad would hurt himself. And unfortunately, that's what happened.

Brad in those emails doesn't mention Tom Scholz, Boston or anything. What he says may have led him to do this as he tried to explain it waw that Pam had had an affair in the fall or summer of 2006—

THE COURT: Who's doing this explanation at this point?

MR. CARTER: Sorry.

THE COURT: Who's doing this explanation?

MR. CARTER: Brad is. Brad in the email to Meg who is trying to explain this was out of my character, this was unusual. I don't know what—

THE COURT: Just help me with this. What is this material to?

MR. CARTER: This is material only to falsity. The Track—

THE COURT: It's not information that the Herald people has?

MR. CARTER: They didn't have it. But it proves certainly by a preponderance of the evidence—I would say much more—but by the preponderance of the evidence that [1-88] Brad did not kill himself because of band-related conflict or because Fran Cosmo was disinvited from the band. He didn't—

THE COURT: So, to what extent is the Court, say in a trial or even on this motion, going to have to decide what the true cause was of Brad Delp's suicide?

MR. CARTER: The Court doesn't have to find what was the true cause, but has to find that the cause given by, reported by the Herald was not the true cause, was false.

THE COURT: But only if they had information that told them that?

MR. CARTER: No. No. Because that's actual malice. To establish actual malice, we have demonstrated they fabricated statements. That constitutes actual malice. Or they ran with a story recklessly based on a biased witness who they didn't—whose veracity they didn't test, and they destroyed notes, things like that from the *Murphy* case. That establishes actual malice.

We still have to prove that the statements given by the Herald, communicated to the public that "Pal's Snub Made Delp Do It," or that in the July 2nd article that Brad was driven to suicide by this Scholz conflict with the other members of the band, that those were not the reasons.

And we can do that in spades by showing from Brad's own words, something they cannot do. They can't—they don't [1-89] have a document, not a single document that shows despair like that we're talking about here. This is the kind of despair that clearly pushed Brad to kill himself.

It was his own fault. No one else was to blame. It was his fault. And that's the story that never got reported. That's the story that the Herald still hasn't reported because they're so insistent on blaming Tom

Scholz, even after this information has come out. But that's why this is relevant.

Furthermore, the last point—and I know the Court will read those emails because they are important on that issue.

Also important on the issue are the suicide notes. Brad left four suicide notes. One of them talked about that he had depression and suicidality since he was a kid, a teenager.

And he writes it was inevitable that things would end up this way for him. He talks about in a suicide note to his children—it's heartbreaking—but he talks about his own emotional issues. He's never been able to open up—related as he said in that note—to his childhood and it interfered with his relationship he said in that note with Micki. It interfered with his relationship to this day with Pam Sullivan. And it is consistent with what he wrote in a public note that I'm a lonely soul.

[1-90] The Herald sort of wipes that off the table, doesn't pay attention to that, and focuses on his band conflict.

THE COURT: Okay. We've got to be done. Okay. We've got to finish here.

MR. CARTER: Yeah.

THE COURT: Okay.

MR. CARTER: The last thing just because I mentioned it on the IIED. I think we clearly have established an incident that would cause—it would likely cause—emotional distress, severe—

THE COURT: Even if it's not—even if it's not defamatory?

MR. CARTER: Even if it's not defamatory, they conducted themselves in a way that would likely cause severe emotional distress. It did cause severe emotional distress.

THE COURT: Okay.

MR. CARTER: And the Herald's argument that you need an expert is not the case.

THE COURT: Okay. We're going to have to stop there because Mr. Robbins signaled that he couldn't reach it. I told him that he wasn't going to have to.

So, we're going to have to—we're going to have to take another session which I think I'm going to need anyway to go—so, let's just look at our calendars and see when I can get you back here next. It's going to have to be in [1-91] November. I can't do anything—

COUNSEL: I'm sorry, Your Honor?

THE COURT: Before November.

COUNSEL: Before November, that's fine.

THE COURT: No, it's going to be after. I'm sorry, it cannot be before November.

COUNSEL: Cannot be.

THE COURT: So, a date in November. And I'm booked on motions solidly afternoons except I can fit you in on a Monday afternoon or a Friday afternoon if we can find one that works. Potentially the 16th of November in the afternoon?

COUNSEL: Actually, I'm not in the state that week.

THE COURT: Okay. How about the next week? That's Thanksgiving week? I'm only looking at maybe Monday.

COUNSEL: The 19th, Your Honor?

THE COURT: Monday, the 19th?

COUNSEL: That would be fine with me, Your Honor.

THE COURT: Probably a good time to use. Do you think you can use that?

COUNSEL: Sorry, I have to . . .

THE COURT: This is Monday of the week.

COUNSEL: I turned my thing off and unfortunately I've got to—I'm slow at this. I think that's good. I think I'm back Sunday.

[1-92] THE COURT: Let me just—

COUNSEL: Tuesday would be better, but . . .

THE COURT: I don't want to book Tuesday.

COUNSEL: No? Okay.

THE COURT: Yeah. I don't want to book a Tuesday.

Because that's running right up against the holiday, people will be traveling and staff. I think that Monday. If I were to give you Monday morning, would that work?

COUNSEL: No. I hope I can have at least the afternoon. I'm coming—I'm taking a trip with my wife.

THE COURT: Okay.

COUNSEL: And I'll be coming back in on Sunday.

THE COURT: All right. So, you want to say two o'clock on the 19th?

COUNSEL: That would be great, thank you.

THE COURT: Two o'clock on the 19th?

MR. CARTER: Yes, Your Honor. Thank you. And thank you for all this time.

THE COURT: Well—

THE CLERK: November, Judge?

THE COURT: November 19th at two o'clock in the afternoon.

So, when I see you on that day, I'm confident I'm going to have some further questions about the defamation count.

And then I'll hear from you on the IIED count.

[1-93] MR. CARTER: If I could, Your Honor?

THE COURT: Sure.

MR. CARTER: Because we've spent so much of your time and put so much paper in front of you, what I'm concerned that we not have is between now and November additional letter writing, you know, campaign to the Court.

THE COURT: Yeah. I'm sure that we've got all the paper. So, if anybody goes home and thinks of something that they wish they had said, I know that you'll hold it until the 19th.

COUNSEL: I hope we haven't initiated any letters to the Court.

THE COURT: No. It has not happened in this case and I'm very grateful. There are other cases where there is lots of correspondence that comes in, but not in this case.

COUNSEL: But if there's an opportunity to respond to what was said, we can save that until the 18th?

THE COURT: Absolutely. Absolutely.

COUNSEL: Thank you. The 19th.

THE COURT: On the 19th.

Now, I have received from Mintz yesterday, two additional banker's boxes. One was the corrected unredacted version. One is the corrected redacted version. So, that the set that I have kept in the lobby and that we've been working off is an unredacted copy that is somehow out of [1-94] order. Is that right, Mr. Lipchitz?

MR. LIPCHITZ: Yeah. Unfortunately, in the double-siding copying process, certain pages and exhibits were copied out of order.

THE COURT: Okay.

MR. LIPCHITZ: And we apologize.

THE COURT: So, I think what I'm going to do is just check that we don't have anything left in that box. And I'm going to give it back to you because I don't have any more room back there for banker's boxes.

COUNSEL: We'd be happy to.

THE COURT: Okay. So, you can take that home.

And then the redacted version I'll have filed in the clerk's office and have it docketed. It's going to take a little while to get all that to happen. But I do have—the impoundment orders and everything are still here in the courtroom. They just haven't been docketed. Are there any issues on the impoundment?

MR. J. ROBBINS: No. We simply—no, there aren't.

THE COURT: Okay.

MR. J. ROBBINS: I had promised to give you *Lambert* and *Mihalik*.

THE COURT: Yes.

COUNSEL: May we do that?

THE COURT: You certainly may.

[1-95] MR. CARTER: Also, I wanted to confirm or find out if the motion to strike has now been withdrawn based on the comments?

MR. J. ROBBINS: I'm disinclined to withdraw it, but I simply ...

THE COURT: Just let's leave it there in the mix.

COUNSEL: Okay.

THE COURT: So, just let's leave it in there for the moment.

COUNSEL: Sure, thank you.

THE COURT: Not take any action at this point. Okay.

COUNSEL: All right.

THE COURT: Counsel, superbly argued, as I would expect from such final counsel. Pleadings are excellent. Thank you all.

We couldn't have done it without Mr. Robbins and Mr. Lipchitz. So, thank you very much.

COUNSEL: That's for sure. And many others. Thank you.

THE COURT: I'm sure. I can see the amount of work that's gone into this. It's been enormous.

COUNSEL: Thank you very much.

THE COURT: So, thank you. It's very much appreciated.

COUNSEL: Thank you, Your Honor.

THE COURT: Thank you.

[1-96] (Proceedings adjourned at 4:17:31 p.m. on JAVS audio recording.)

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. Superior Court Department
Of The Trial Court

Docket No. SUCV2010-01010

SCHOLZ

v.

BOSTON HERALD, INC., ET AL.

TRANSCRIPT OF HEARING: RULE 56 MOTION
BEFORE THE HONORABLE
FRANCES A. MCINTYRE

Volume: I
Pages: 1-55
Exhibits: None

Boston, Massachusetts
Courtroom 1008
November 19, 2012

Proceedings recorded by Court Personnel
Transcript produced by
Michelle Costantino, Approved Court Transcriber

[1-2] APPEARANCES:

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[1-3] PROCEEDINGS

(Proceedings commenced at 2:08:48 p.m. on JAYS audio recording.)

THE CLERK: Calling Scholz vs. Boston Herald, et al., Civil Action 2010-1010. The matter before the Court is for a Rule 56 summary judgment.

THE COURT: Good afternoon, everyone.

THE CLERK: Counsel, if you could please identify yourselves for the record.

MR. CARTER: Your Honor, Nick Carter on behalf of the plaintiff, Tom Scholz.

THE COURT: Mr. Carter.

MR. S. ROBBINS: Good afternoon, Your Honor. Seth Robbins on behalf of the plaintiff.

THE COURT: Mr. Robbins.

MR. J. ROBBINS: Good afternoon, Your Honor. Jeff Robbins on behalf of the Herald parties. And we have Mr. Purcell, Mr. Sciacca, Ms. Fee and Ms. Raposa.

THE COURT: And you're all most welcome. Good afternoon to all.

MR. LIPCHITZ: And Joe Lipchitz on behalf of the Herald parties, Your Honor.

THE COURT: Mr. Lipchitz.

Okay. Good afternoon. And thank you all for returning here for the second hearing on this very substantial motion [1-4] for summary judgment.

My memory is the last time we were here, we were able to get through Count 1, claim of defamation, and what remains is the discussion of the intentional infliction of emotional distress.

MR. J. ROBBINS: Yes, Your Honor. I think that Your Honor—

THE COURT: I'm not sure if there's anything else that's still open.

MR. J. ROBBINS: Your Honor, I think you indicated that I'd be permitted—and perhaps Mr. Carter as well—to simply reply to the argument that was being made.

THE COURT: Yes. Okay. So, as soon as everybody gets settled, I'll hear from you, Mr. Robbins. Okay.

MR. J. ROBBINS: Thank you.

THE COURT: Mr. Robbins, how do you suggest that I use our time this afternoon? How much time do you think you'll need in rebuttal and how much time do you think you need on your second motion?

MR. J. ROBBINS: I think I need 15 minutes on rebuttal, if that's acceptable, and less than 10 minutes on the other, on the IIED claim.

THE COURT: Okay. What do you think, Mr. Carter?

MR. CARTER: That should be fine for me as well.

THE COURT: You think 10 minutes as well?

[1-5] MR. CARTER: On the IIED?

THE COURT: Yes.

MR. CARTER: Yes.

THE COURT: Okay. All right. I'm not holding you to that tightly. I'm just trying to get a sense to make sure we don't go too far afield and I don't—make sure everybody gets a fair amount of time, okay.

MR. CARTER: Thank you.

THE COURT: You're very welcome.

Mr. Robbins, go right ahead, sir.

MR. J. ROBBINS: Thank you for all of the time, Your Honor.

First of all, you had asked last time whether Judge Cratsley's decision in the Delp action was in connection with the collateral estoppel issue, a final judgment. I told you it was. And I think Mr. Scholz doesn't contest that. But if there were any doubt about it, I wanted to read to you what Mr. Scholz has said in the Delp appellate brief. Quote, "Accordingly, the Court entered final judgment in Ms. Delp's favor as of August 23rd." That's on Page 19 of his brief.

And you should note for your own purposes that the Appeals Court is having an argument on Mr. Scholz's appeal in the Delp action on December 6th.

THE COURT: Okay. Thank you.

[1-6] MR. J. ROBBINS: We provided you with a transcript of the first day of the hearing, and we did so because Your Honor repeatedly asked—as I'll walk through the questions which were the dispositive ones in this case.

I had pointed out that the *Gacek* case, which was that case decided by the 8th Circuit, was directly on point. And in *Gacek*, as I mentioned, we don't have to pretend for argument's sake as we do here that the defendant had asserted that the plaintiff had caused another person's suicide because it was undisputed that that is exactly what he had asserted three separate ways.

And it wasn't a matter of supposed innuendo in the aggregate as it I guess is here, and I'll get to that in a minute. It was a flat out assertion that the plaintiff had caused another suicide. And the *Gacek* court said straight forwardly that is not capable of being proved true or false and it's non-actionable opinion.

And at Page 74 of the transcript, Your Honor asked —Mr. Carter said the *Gacek* case was, quote, "distinguishable." And Your Honor asked twice, "Why? Why?"

And what followed was in candor a half-hearted attempt by Mr. Carter to draw a distinction which has absolutely no meaning. Well, he said, this involved the factory floor and a co-worker and a supervisor and a shortened work day.

That's not a distinction. That has no—that's not a [1-7] distinction in this case. The whole of the ruling is that when somebody accuses—actually does accuse somebody else of being responsible for another's

suicide, it doesn't matter whether it's on a factory floor or in a factory or on a field or on a farm. It's not actionable opinion. It's pure opinion.

And the *Gacek* case, as I've said, squarely covers this case. Because in Mr. Scholz's mind at least, or in his characterization for this purpose of what the article conveyed, somebody had accused him of being responsible for another's suicide.

There's one case on that issue that any of us apparently have been able to locate, one case on whether or not when that assertion actually is made, it's an actionable statement of fact or non-actionable opinion.

The one case is *Gacek*. And you put your finger on it when you stated at Page 76, "I have a sense"—quote, you said, "I have a sense that this is probably the nub of the case really as to whether this is an opinion or a statement of fact."

Gacek case says that it is clearly opinion. Mr. Scholz has provided no case saying that the assertion that somebody is responsible for another person's suicide is an actual matter of fact. We've found none. There appears to be found none.

[1-8] So, what they do is they artfully—and the transcript changed the subject—and they said, oh, we have these two Pennsylvania cases. And these old Pennsylvania cases really you should have in mind. But they're not opinion cases. They're not cases that have anything to do with whether or not such an assertion is a statement of fact or opinion.

These old Pennsylvania cases say that in those cases that an assertion could be defamatory. But there are five tests. One is of and concerning; two is defamatory;

but the third is whether or not if it's made and it's of and concerning and it's defamatory, it's non-actionable opinion.

So, to hold those two Pennsylvania cases up as though they contradict *Gacek* is simply misleading. One case on the subject, and it's *Gacek*.

So many Massachusetts and D Mass. and First Circuit cases reaffirm and apply the rule that if an assertion is not objectively verifiable, not provable as true or false, it's non-actionable opinion.

I simple leave you with one—with a quote from one, the First Circuit's decision in the *Veillieux* case, V-E-I-L-L-I-E-U-X, or something close to that. We've cited it in the—in our principal brief. We cited it in the reply brief. And here is what the First Circuit said. And these are words which could have been really in this case.

"Insofar as Dateline was expressing its own opinion as [1-9] to a supposed connection between the described mentality and accidents, that expression was constitutionally protected. We think that reasonable viewers would understand this statement even if sensationally worded to be one of viewpoint rather than fact."

Point two. Suppose you didn't agree and you thought that these articles actually did assert that Scholz was responsible for Brad Delp's death. And supposing you thought that it was a mixed question of opinion and fact. And that's when *Driscoll* kicks in.

And thereto I want to point the Court to its own questions which were precision, right on target. Because it is clear that the Herald—if that how it's being construed, which we say it cannot be—the

Herald fully disclosed the basis for the supposed opinion by including verbatim, verbatim, every word that Micki Delp said.

If this is being characterized as the expression of the opinion that Micki Delp blamed it on Scholz, and this was an opinion, the entire—or that it was the Herald's opinion, every word that Micki Delp uttered which formed the basis for the quote, "opinion," was disclosed.

And, so, it is exactly like that press release in *Driscoll* that the Court pointed to during the course of the transcript.

But it's better than that. Because not only does the [1-10] Herald disclose every single word that Micki Delp said, it goes beyond that. If you read the numbered March 16th article, which I think we gave—we did give you and we'll give you another one—you'll see that the Herald said—goes through it and says—Paragraphs 5 and 6—it goes out of its way to quote Tom Scholz saying that the firing of Cosmo was something that Brad Delp approved of rather than that it upset him.

Then in Paragraphs 7 and 9, it discloses that Delp left a suicide note, and discloses that in it he says it was his own responsibility, that it was nobody else's responsibility, and that, quote, "I take complete and sole responsibility for his present situation."

The Herald discloses the existence of the suicide note and affirmatively the fact that far from mentioning Scholz, he takes responsibility for himself.

And then in Paragraph 14, it goes beyond that and it discloses that Delp's fiancee had told police that Delp was depressed and feeling bad about himself. So,

it goes out of its way to disclose exactly what Micki Delp said, and it goes out of its way to disclose facts which not only don't blame Scholz, but if anything exculpate Scholz.

So, it is exactly like the *Driscoll* case, only frankly more powerful then that press release in terms of the full disclosure.

[1-11] And indeed I note that at Page 75 of the transcript you say, quote, "Well, let me just stop there with that. You say the basis isn't disclosed. I mean, it would seem to me that everything the Herald writers had they would have put in the article."

And then you go on and you say at Page 77, and you say, quote, "But the information is in the article."

And then you say later on on the same page, "It really is similar to the rest of what I assume was a press release in the *Driscoll* case, where information is disclosed and that it's clearly—it can be seen that this is an opinion based upon the disclosed information."

So, number one, under *Gacek*, the one case out there, it's pure opinion and you don't even get to the need to disclose. But if you thought for some reason it wasn't pure opinion and it's mixed, then the *Driscoll* case as you said indicates that it's non-actionable opinion because it fully discloses the basis for the opinion and the reader can decide for itself is that really what the opinion was? Is it an opinion which is based on anything? They can make their own judgment. And that's how all those cases go off.

Any way you slice it, whether it's either pure opinion under *Gacek*, which we say it is, or it's mixed opinion, in which case *Driscoll* and all those other cases which

hold the same proposition govern, and it's non-actionable, and that's [1-12] the end of the case.

Third point. Something not merely important but dispositive occurred during the hearing for which I've given you the transcript. Mr. Carter was unable to identify a single actual actionable statement with actual words that was of and concerning Scholz, that accused him of defamatory wrongdoing and that was false. Let's put aside the issue of actual malice because you don't even need to get to that.

He had 50 minutes to identify in response to some questions that you asked the actual words in an actual statement and he couldn't do it. And, therefore, what he said to was that the flavor of the three articles portrayed him as a tyrant.

And you focused this on Page 62 when you asked him whether he was proceeding on a theory of insinuation and implication? And he punted, as you'll see when you read the transcript, because that is indeed the theory on which they rely.

But we don't do flavor in defamation cases in Massachusetts. And we decidedly don't do flavor or innuendo in the aggregate where it comes to public figures. That's that *Mihalik*, the appeals court case, that we raised, that we gave to you, and that Mr. Carter has never mentioned.

And here's why not. Under *Mihalik*, if there is a public figure, as Mr. Scholz is here—excuse me—and if [1-13] there's no actual identifiable false statement of fact of and concerning the plaintiff that accuses him of defamatory wrongdoing, insinuation in the aggregate is legally insufficient.

You'll recall—in other words, where you have a public figure, you have to have an actionable statement. You can't take a collection of non-actionable statements and then come out the other end with a theory of insinuation.

You'll recall that in *Mihalik* what happened is that in the—the Superior Court said there are no actionable statements of—actual statements. All the individual statements are true. But I'm going to give it to the jury on the basis of innuendo in the aggregate.

And the jury actually came back and found for the plaintiff, went up to the Appeals Court and the Appeals Court said no.

The case law when you're a public figure has evolved since those—*New York Times vs. Sullivan*—since those old cases on which Mr. Scholz actually relies. And if you're a public figure, you can't do it that way. You've got to have an actual false statement of fact.

If you can't—if you can, you get to a jury on that false statement of fact of and concerning the plaintiff that accuses him of defamatory wrongdoing which is a statement of fact and which was uttered with actual malice. Then you get [1-14]—you go to the jury on that statement.

But otherwise you can't throw it all out there and say the flavor was negative or there's insinuation in the aggregate. If we're correct about *Mihalik*, and I believe we are, then on that separate basis we're entitled to summary judgment.

Fourth. Supposing *Mihalik* had never been decided. Supposing you could—you couldn't identify an actual false actionable statement of fact, as Mr. Scholz was unable to do, but you could kind of look at the entirety

and see if there was innuendo in the aggregate. Supposing *Mihalik* just never existed.

We had given you at the end of the last day a copy of the First Circuit's decision in *Lambert vs. Providence Journal* which illustrates what a court does. It goes through under those circumstances and it says let's see all the things that the paper put in and let's see what it actually says, and could it reasonably be construed as accusing the plaintiff of wrongdoing, in that case a crime.

We gave you the March 15th article last time and I walked you through all the things that they said which like the March 16th article showed that it wasn't blaming Scholz. It had no basis for saying that. It disclosed all these things. It could reasonably be construed that way. I won't repeat that.

[1-15] On March 16th, I've essentially already covered that. If you go through that article, you'll see all those places where it—as I said just a moment ago—it says that he takes full responsibility. They have no idea. He was depressed. The suicide note doesn't mention Scholz, et cetera.

So, just as the First Circuit did in *Lambert*, even if you could proceed—if they could proceed on an innuendo in the aggregate theory, when you read each of these articles you'll see that none of them can reasonably be construed.

I point out, by the way, that in *Lambert* and SJC cases the fact that you have people who say, "oh, you know, I read it that way" doesn't do it. It doesn't do it. And *Lambert* and in *Elm* and the SJC cases, they say that's nice, but—this is the First Amendment. The Court decides whether it can reasonably be construed as accusing this person of defamatory wrongdoing.

That's the gatekeeper function that the Court applies on each one of those five tests where summary judgment is favored in defamation cases and where defamation cases are disfavored.

Fifth. The July 2nd article. All I will do is ask you to read it. I'll say nothing more. You'll see there's no actionable statement in there accusing Scholz of being responsible for Brad Delp's death. I'll say nothing more [1-16] about it.

Let's assume you get to—you got to the issue of actual malice. As you know, what they have to do there is adduce clear and convincing evidence that the Herald published individual statements entertaining serious doubts about its truth; or as one court has put it, with a high degree, a high degree of awareness—that's the Supreme Court standard—a high degree of awareness of its probable falsity.

Now, they don't have any such evidence. They don't have any evidence because the Herald reported what its people—what these people told it, and it's constitutionally entitled to do that.

So, they try to circumvent that by finding some sugar substitute, some substitute for the absence of such evidence. And one of the things they try to do is to argue the Herald knew that Micki Delp was biased.

So, first of all, bias as a matter of law is not enough. Everybody is biased. Everybody has a bias. Everybody that a newspaper reporter interviews has some sort of bias. If bias were actual malice, there would be absolutely no First Amendment at all.

Second, and even more fundamentally than that, remember that Judge Cratsley has already ruled that none of the statements that Micki Delp made to the

Herald were even of [1-17] and concerning Scholz. So, how could there be a bias against Scholz in publishing statements which Judge Cratsley has already ruled weren't even of and concerning him.

Third, Judge Cratsley has also ruled as a matter of law that none of the statements Micki Delp made to it defamed him, accused him of anything. So, how could the Herald similarly have actual malice in publishing statements made by Micki Delp which it has already been ruled did not accuse him of anything?

And, fourth, Judge Cratsley has already ruled that none of the statements that Micki Delp made to the Herald were uttered by her with actual malice, entertaining serious doubts about it.

So, if Micki Delp didn't have those doubts as Judge Cratsley has ruled, how could the Herald have actual malice by publishing her statements? So, the close scrutiny of that claim causes it to fall apart.

Now, it happens—you don't even need to reach this point, but since the entire premise of Mr. Scholz's rhetoric is that there's some dispute about what Micki Delp said, I repeat, there's no dispute.

As I told you, Micki Delp has testified from the very beginning, up, down, and sideways, that every single quote, every single place in the Herald where the Herald quotes her is exactly what she said. There is no dispute about it.

[1-18] I point you to Fact Number 382, which will not be easy to find in the midst of all that, but in any event I reference it.

Question: "Is there any quote that the Herald attributed to you which you did not in fact say to them?"

Answer: "No."

So, here's the new theory. The theory is that the Herald's lead—if the Court has the March 16th article someplace that's available—the lead in which it doesn't purport to quote Micki Delp because there are no quotation marks, which tells everybody it's not quoting Micki Delp. It's its own words summarizing the interview, the back and forth, the questions and answers.

That's the lead by the way, this lead is the lead that Judge Cratsley at Statement 5 has already ruled, A, isn't of and concerning Scholz, and B, doesn't accuse Scholz of anything. That's the—the basis for the fabrication theory is a lead which Judge Cratsley has already ruled is out of the case; it's not actionable for several different reasons.

But you may remember that in my opening statement I had told you she didn't say the words in the lead. It's the Herald's writing. And that Mr. Carter then went back and dramatically showed you the transcript where she said, "No, I never said those words." I know she never said those [1-19] words. I told you she never said those words.

But what they didn't want you to see is what she testified when she was asked for the first time whether notwithstanding the fact that these were not her words, the Herald's writers—using by the way the constitutional leeway that they're entitled to have anyway—had accurately summarized what she had said, what she had told them.

The lead, you'll see from looking a it says, "Boston's lead singer Brad Delp was driven to despair after his long-time friend Fran Cosmo was dropped from a summer tour; the last straw in a dysfunctional

professional life that ultimately led to the sensitive front man's suicide, Delp's ex-wife said," without quotes. But it shows it so it's paraphrased.

So, we quoted Micki Delp at Pages 30 to 31 of our reply brief and also our principal brief. They ignore it because here's what she says when asked whether she—this conveyed accurately what her opinion was and what she told them.

She said, "Brad and I just had several conversations about it. I knew he was extremely upset about it. It's the only thing I knew he was extremely upset about. It's just all I knew. I would say despair is a fair word, and I would say despondent is a word that would describe it. When I was asked if there was something that would upset Brad to that [1-20] point, my answer was that Brad was upset that Fran had been disinvited. My opinion of what caused Brad to take his life, I had my own opinions about it. And I feel that I am somewhat responsible and actually may be conveying that to the Herald at this time. And it was my personal opinion that Fran being disinvited from this tour was a large part of Brad's decision to take his life. So, I take responsibility if that was conveyed in my statements to that. I may not have realized I conveyed so much in my words, but I obviously used them. So, sitting here today I'm even more convinced that my opinion that I held then is in fact the—exactly what caused Brad to take his life."

In short, this lead, which doesn't purport to quote her, which the Court, Judge Cratsley, has already ruled isn't about Scholz and is not defamatory of Scholz, is accurately—according to the person who gave the interview, summarizes what she conveyed to them and what her opinion was then and what it is now.

Now, the point was made that—the argument was made that one the substitutes—since we don't have any evidence that—let alone clear and convincing evidence that the Herald published anything believing it to be false or of a high degree of awareness that it was false, the argument was made, and you recall, that, well, there's the destruction of the notes.

[1-21] And one of the last things I said to you was thank God. I talked to you about the fact that the SJC doesn't require the preservation of notes when there is concord or agreement between reporter and interviewee about what was said. And it also doesn't require it, doesn't get to the actual malice, if there is no duty to keep the notes because there hasn't been a claim made against the newspaper. And of course there wasn't any claim here. Scholz didn't even contact the newspaper. Micki Delp did. But a third-party witness—I quoted the *Fletcher* case—which stands for the proposition that that doesn't get you there.

But there is in fact a document—and I mentioned it last time, but I'm not sure if in the—I'm not sure if it registered—and, so, I want to reput up to you a blowup that Mr. Carter showed to you last time with the Court's permission.

THE COURT: Okay.

MR. J. ROBBINS: And, you know, we also—I'm sure we have—in fact, I know I have a copy of it which I can give to you.

THE COURT: I know that that's—I've got that because I read that this afternoon. So, I've got that.

MR. J. ROBBINS: Would you like my copy?

THE COURT: Sure, I'll take an extra copy.

MR. J. ROBBINS: If I may approach, Your Honor?

[1-22] THE COURT: You certainly may.

MR. J. ROBBINS: You see the top part is in fact an e-mail that Gayle Fee, which is Track gals, sent to Scholz's publicist immediately after getting off the phone with Micki Delp. It's a contemporaneous e-mail.

So, if there's any question of whether or not there's documentation confirming what Micki Delp says she said, confirming what Gayle Fee says she said, supposing we need a piece of paper apart from the concord because we don't have the notes, here's the e-mail that she sends to her to contemporaneous "I just talked to Micki because the cops released the suicide notes. She says Brad was in despair because Fran Cosmo was disinvited for the summer tour."

So, there you have it. If there's notes that's necessary, here's the note. It's a contemporaneous e-mail which thank God exists showing that yes, that's exactly what she said. There's no actual malice. There's no fabrication. The fabrication theory is a fabrication.

There's a second reason why I want you to see this. It's not, I have to confess, incredibly material for summary judgment, but since it was used, I want you to see it.

You may recall that Mr. Carter said, oh—I can give you the page citation—Gail Parenteau e-mailed Micki Delp immediately and said, "Don't publish this, she's got an agenda."

[1-23] Well, there's a problem with that. Have a look at this. She admits that it's a cut-and-paste job. She admitted under oath, Gail Parenteau, that she didn't send this. This is a cut-and-paste job. You can see that it's a cut-and-paste job.

If it were an e-mail that had been sent by Gail Parenteau to Track gals, there would be here a space where it said Parenteau to Track gals. It's not there. And this is not sleuthing, frankly, on our part because we asked her the question, and we have the transcript if we need to show it to you, where she is asked—

THE COURT: I'm not sure—Mr. Robbins, I'm not sure I get what you—what are you saying is missing? Are you suggesting that part of this was forwarded or this is a . . .

MR. J. ROBBINS: Oh, I'm simply saying that—that when you were told last time that Scholz's publicist sent an e-mail to the Track gals—

THE COURT: Okay.

MR. J. ROBBINS:—and said "don't publish this"—

THE COURT: Right. Okay.

MR. J. ROBBINS:—and that was bias—

THE COURT: Okay.

MR. J. ROBBINS:—I've gone through the reasons why as a matter of law bias doesn't do it. It's not even of and concerning Scholz. It doesn't accuse him of anything. So, [1-24] what she said to the Herald isn't actionable anyway, there it can't be biased.

But since the point, the argument, the statement was made to you that this e-mail was sent by Parenteau to Track gals—

THE COURT: Yeah.

MR. J. ROBBINS:—this was sent to Gail Parenteau by Gayle Fee. There are two Gails, which makes it even more confusing.

THE COURT: Okay.

MR. J. ROBBINS: There's Gayle Fee, who is the Herald reporter. There's Gail Parenteau.

THE COURT: Okay.

MR. J. ROBBINS: Just happens that the case isn't confusing enough, we have to have two witnesses named Gail.

She never sent this and she admits that she never sent it. She was asked in her deposition:

"This is a cut-and-paste version; correct?"

"Yes."

"This document is a cut-and-paste job; correct?"

Answer: "Yes."

And you can see this is a cut-and-paste job I'm simply saying because, A, she's admitted it, but, B, if this had been—if this had been sent back to Gayle Fee at Track gals, there would be a place where it said from Gail [1-25] Parenteau to Track gals, you'd have the date and the time.

She created this document after the fact and that wasn't related to you somehow in the presentation last time. It's not critical for summary judgment purposes, but it is instructive.

THE COURT: So, just not to put too fine a point on it, but you're saying that it is being presented as an e-mail but it's not actually a disseminated e-mail?

MR. J. ROBBINS: In fact, it's not. But frankly even if it was—let's pretend that it was—

THE COURT: Okay.

MR. J. ROBBINS:—it doesn't matter. It's not an issue, a disputed issue. It's not a material issue in fact for all the reasons I've gone through. A,—

THE COURT: Yes. I got all that.

MR. J. ROBBINS: Okay.

THE COURT: It's just that you threw me off when we were talking about the extra line in there and what I ought to see. I wanted to be clear that I got your meaning.

MR. J. ROBBINS: Sorry.

THE COURT: Okay.

MR. J. ROBBINS: Finally on this, on the defamation claim. The assertion was made to you with respect to the March 15th article—at Page 54 of the transcript, Mr. Scholz represented to you "Ernie Boch and Paul Geary both [1-26] denied providing information for this article." That's what was represented to you.

Further, Paul Geary says I didn't even know about—enough about the band conflict and even Brad's reaction to it, and no basis to know if that's why Brad killed himself. I was stunned. And then they also fabricated the statements from Paul Geary and Ernie Boch.

That's what was said to you in the transcript, as you'll see when you go by it.

So, you'll see this, if you care to dig through all of the stuff we've provided to you. But just let me just read to you because it's just patently false. Here is what Paul Geary said.

The question was: "And in fact you felt that the animosity between Mr. Scholz and Barry Goudreau

and Sib Hashian had taken an emotional toll on Brad Delp too, didn't you?"

Answer: "Yes."

"And that is a view you held shortly after Brad's death. Correct?"

"Yes."

As you'll see when you through this if it's—although it requires some digging—

"When you were speaking with Gayle Fee, do you have a memory one way or the other of sharing that information with [1-27] Ms. Fee?"

"I may have. I don't have a specific recall of the conversation, but yes."

And then finally, four and a half years—"There's no doubt in your mind you spoke to Gayle Fee about Brad's death in the days after he died?"

"That's true."

"And she asked you a series of questions at that time?"

"That's probably true, yes."

"Now, after four and a half years, later you can't recall what those questions were. Can you? But you answered those questions truthfully. Didn't you?"

"Whatever I told her would have been what as my belief."

Finally, "Do you recall one way or the other"—let's see—

"Do you have a memory one way or the other, sir, of sharing those views that Micki and Barry"—Micki Delp and Barry Goudreau—"had conveyed to you—do

you have a memory one way or the other of sharing those views with Gayle Fee after Brad Delp's death?"

The witness: "We had spoken on many occasions and I'm sure I shared some of that information with them."

So, when you were told that they denied providing information for this article, it's just simply wrong. The [1-28] same thing with Ernie Boch. If you want that, I'll provide it to you. But I think I'll rest on that one and turn to the IIED claim.

THE COURT: Okay. Let's find out if Mr. Carter has any final comments.

So, Mr. Carter.

MR. CARTER: On this defamation piece?

THE COURT: Yes.

MR. CARTER: Absolutely I do.

THE COURT: Sure.

MR. CARTER: Do you want to hear from me now on that?

THE COURT: I'd be happy to hear from you, sir.

MR. CARTER: Okay. Thank you, Your Honor. I'm just going to pull this up.

THE COURT: Sure. Whatever it is you want to do. (Pause.)

MR. CARTER: I just want to remind the Court—and I don't have the March 15 headline of the paper, but it's attached in numerous places to the pleadings—and what it does show, the March 15 article, at the bottom, it says, "Behind Brad Delp's tragic suicide." That's on the front page of the Boston Herald. And then inside there's an article discussing the reasons for his

suicide. Here the next day on the front page of the Herald, "Pal's Snub Made Delp Do It."

[1-29] There are—and July 2nd, there is a definitive, declarative statement of fact that it was this alleged old band conflict, that the Herald itself describes as never-ending, which drove Delp to suicide. These are affirmative fact statements that are defamatory.

Judge Cratsley found in reading the articles himself that that was the gist of the articles, that they in fact conveyed the message to the public that Tom Scholz caused or contributed in a substantial way to Brad's suicide and that was defamatory. Many others have read the article in that way.

If the Court's job is—and the only basis for taking this away from the jury would be if no reasonable juror could read these articles and conclude that they blame Tom Scholz as a matter of fact or as a matter of mixed opinion.

So, if the Court finds that a reasonable person could read these articles and conclude that in fact somebody could understand these articles to be telling me the actual cause of Brad Delp's suicide, then the case goes to the jury on that issue of whether it's a fact versus a pure opinion.

Or if the Court finds that a reasonable juror could walk away from this saying, well, maybe it's an opinion, but there's a suggestion of additional facts out there that I'm not being told that are defamatory, namely, that additional facts to support the notion that Tom Scholz caused or [1-30] contributed to Brad Delp's suicide, then the case has to go to a jury.

Only if the Court concludes that a reasonable juror could only conclude one thing, and that this is a pure

opinion, then the Court takes it away from the jury. But that's not this case. That's not these articles.

I think that the Court will see from the Court's own reading of the articles that they do convey factual information, which is false, suggesting that Tom Scholz caused or contributed to Brad Delp's suicide.

Mr. Robbins, I disagree with him strongly that there's only one case regarding this type of factual circumstance where it's reported that one person caused the suicide of another. Because in fact there are two cases, two additional cases, that we know of that we've submitted to the Court, the *Rutt* case and the *MacRae* case, that are directly on point, closer to this case, because they involve a newspaper reporting what it had learned regarding one person's alleged—allegedly causing the suicide of another person.

And in both cases, the Court affirmed that it involved a jury question or sent it to a jury for resolution. And implicit in that decision necessarily is a finding that there is at least a defamatory fact statement or defamatory statement of mixed opinion.

[1-31] The most important point is that these articles contain false factual statements about the cause of Brad's suicide. And I just want to run through that with the Court briefly.

First of all, we've pointed out in the papers, it's no defense for the Herald to say, well, we've quoted—we've quoted somebody, whether it's an unnamed insider or an unnamed friend or Micki Delp; and, therefore, we can't be held liable.

That's directly contradicted by the law. In *Jones v. Taibbi* and many other cases it's very clear that

repeating a defamatory fact statement or a defamatory statement of mixed opinion is actionable. And the Herald has been held liable in the past, and many other papers have been held liable, for doing that.

What protects a paper is the notion of actual malice; that, okay, if they repeat and it's defamatory, they can be held liable. But there has to be evidence of actual malice, which I will get to. There has to be evidence that they did so either knowing it was false or with reckless disregard for whether it was true or false. And we established that in our papers, and I'll get to that more fully in a moment.

But to determine whether this is a fact statement or opinion, the fundamental question is whether it is provably false, whether it can be proved true or false. And that's the—that proposition is stated in the *Lyons* case at 390 [1-32] Mass. 51.

And we discussed last time that this is very much a provably false allegation that Tom Scholz was responsible in some way for Brad Delp's suicide. The state of mind of anyone is often the subject of our court cases and is a question that's given to a jury to resolve.

And in the—it was in fact in the *Rutt* case and the *MacRae* case, the two suicide cases that I've mentioned, at issue. And it is at issue in the *Tech Plus* case which we've cited, which there is an allegation that somebody is anti-Semitic and is mistreating the speaker and the person who is accused of being anti-Semitic in fact brings a case for defamation and it's allowed to go to a jury because that is, the court finds, a provable state of mind whether somebody acted out of a discriminatory purpose.

And here in the cases that I've mentioned, the suicide cases, and the court's prior decision in rejecting

the Herald's motion to dismiss, the court has said that we repeatedly, especially in criminal cases, but also civil cases, look at a person's state of mind and allow a jury to resolve that fact question of what it was that led Brad Delp to commit suicide.

And this case it is very provable and very relevant why he committed suicide, because the Herald missed the story entirely and continues to deliberately fail to publish the [1-33] real facts which in fact do go to their state of mind.

But the real facts, as I alluded to last time, relate not surprisingly to Brad's personal life. They have nothing to do with the band or his professional life. In fact, in his suicide notes and in his very emotional e-mails with Meg Sullivan and Todd Winmill, the end of his life, in the last ten days of his life, he doesn't mention Tom Scholz. He doesn't mention the band Boston. He doesn't mention Fran Cosmo. He mentions nothing about his professional life.

What he mentions over and over and over again are his personal emotional issues from childhood that have left him unable to deeply connect and open himself up on an emotional level to people. That's consistent with his public suicide note of being lonely, et cetera.

And of course there is the fact that he committed a very serious act of misconduct toward his fiancee's younger sister. It is a very tragic and clearly very painful to him set of circumstance that overwhelmed him.

So, to the article about the false statements of fact, they say in the March 15 article, "Brad was literally the man in the middle of the bitter breakup of Boston, pulled from both side by divided loyalties."

This is not even a statement they attribute to an insider. It's a statement that the paper makes on its own. The Herald claims that the statement was supported by Paul [1-34] Geary, but Geary testifies, contrary to what the Herald has just alluded to factually, that he was unaware of anything in Brad's relationship with the others, the former band members, that gave him any indication that he killed himself as a result of any difficulties in those relationships.

And he did not tell anyone that Brad's suicide may have been related to these relationships because he did not have enough information in March 2007 to form an opinion as to a possible reason for Brad's death. And this is laid out in the Fact Statement 637 to 640 in the papers.

And I would note that the Herald in the March 15 article at the very end attributes to an unknown—an unnamed insider that no one knew why Brad did this; but because he was a—you know, had a dark side, it was not totally surprising. But again no one knew what caused this.

The Herald subsequently says that was a statement made by Paul Geary. Well, Paul Geary would not be saying we had no—no one saw this coming, no one had any idea why it happened, and yet at the same time telling the Herald it had to do with these old relationships. Those are mutually inconsistent statements.

But most importantly, Paul Geary said under oath "I didn't say it. I had no basis to know. And, therefore, I wouldn't have said it." And a jury should be entitled to see that and evidence of the fabrication of that statement.

[1-35] Ernie Boch testified that he was not a source. The Herald attributed some of these statements in March 15 to Ernie Boch. That's fabrication.

THE COURT: Are we—I'm just—I'm concerned, Mr. Carter. Are we going over the same arguments from last time or are you addressing it directly?

MR. CARTER: Well, I'm trying to respond to and make very clear—

THE COURT: We just—

MR. CARTER:—to the Court that what's most important is not to get into the weeds of is this mixed opinion or not, but to focus the Court on this being false statements of fact, that the statement in Paragraph 5 of the March 15 article that "Brad was literally the man in the middle of the bitter breakup" was a false fact, provably false.

The people who supposedly said it don't agree with it and say they didn't say it. There's testimony from the people who supposedly provided information to Ernie Boch, namely Sib Hashian and Barry Goudreau, who say these old conflicts, these old animosities from the 1980's, did not contribute to Brad's death.

This is relevant to show that these are provably false fact statements.

THE COURT: Okay. But we've gone over it. We had a thorough argument last time. This is really—anything you [1-36] want to respond to Mr. Robbins? This is really a final comment. I don't want to reargue it.

MR. CARTER: Sure. So, the important point is these are provably false fact statements. You don't even get into mixed opinion. But if you do get into mixed opinion, which Judge Cratsley said in his view this

is—without even deciding fact versus opinion, it's at a minimum mixed opinion because there is the suggestion of other undisclosed facts that would support the statements here and that are defamatory, that makes it actionable. There's the context of the article being the Inside Track, insiders providing the information.

As to the *Driscoll* case, there's very important language in that case where the Court states—and this is at 70 Mass. Appellate at Page 297—they made it clear in—the school in reporting about this incident made it clear that they believed it was a coercive—it was coercive conduct because five boys had coerced the girl into sexual activities.

And that was based, quote/unquote, "Alone," the Court wrote, "on the disclosed fact that it was a five-on-one situation which is by definition coercive."

So, what the Court is signaling there and saying expressly in that press statement, there was—the school was communicating that the sole basis for the statement it [1-37] was coercive was this five-on-one situation. There was no suggestion or nothing left to the reader to perhaps conclude there might be additional facts to support the allegation of coercion.

Here we don't have that. Here there is no closing and circumscribing the set of explanations for Brad's suicide. It's it was the age-old conflict or it was the snub of Fran Cosmo, but there's nothing beyond that to say, well, what about those—these—would support this statement. These people must know something more that isn't being disclosed to the public; so the public is not left to be able to say, oh, that's just someone's opinion.

In fact, it is a suggestion that Brad did kill himself as a matter of fact because of these two things, with the additional fact statement that Tom Scholz forced him to do Boston, to perform with Boston, was somehow able to do that, there is the suggestion they know more that we haven't been told.

And, so, Tom Scholz is left damaged because the public takes away from this the conclusion that the people who are on the inside, Brad's family and friends, say it was these things.

THE COURT: Okay. I'm going to have to reign you in. You've got two more minutes.

MR. CARTER: Okay. The *Mihalik* case regarding [1-38] innuendo. There absolutely are cases that we've cited in our papers that—where courts say innuendo is very much actionable. There's a—the *Metro* case and many others that we cite where the mere suggestion—and the *Stanton* case had to do with a picture of a girl, an article about sexual activities of teens, and there was an implication, an innuendo, and that was deemed actionable.

The *Mihalik* case and the other cases the Herald cite do not stand for the proposition that a public figure cannot make—that a public figure cannot make out a claim based on innuendo.

Those cases, first of all, involved public officials and that's a very different and distinct category.

And furthermore in *Mihalik*, there is no statement or holding that a public figure or a public official cannot make out a case based on innuendo, only that in this particular case the public official had not made out a case based on innuendo.

I also want to make the point that in addition to the false statements of fact and the mixed opinion. It is actionable if a paper falsely attributes opinion to a third person. And in this case, that's—as a final argument, that is what the Herald did. They falsely attributed to insiders opinions that they didn't have or statements they didn't make, whether that was unnamed insiders or Micki [1-39] Delp.

And I would just quote to the Court and provide to the Court a couple of cases on that point. And I can pass up the cases if the Court would like.

THE COURT: That's what you're going to have to do.

And you're going to have to finish up here, Mr. Carter.

MR. CARTER: All right. Well, let me pass this up then, and you'll have the—

THE COURT: Okay. I'll have it.

MR. CARTER:—the case law.

THE COURT: Okay.

MR. CARTER: Just very quickly on actual malice, Your Honor, if I could.

THE COURT: Okay. No, I think I'm—Mr. Carter, thank you, sir. I've got to—we've got to move on.

MR. CARTER: All right.

THE COURT: We've got to move on. Okay. To the Herald and it's motion for summary judgment on the IIED claim. Go ahead, Mr. Robbins.

MR. J. ROBBINS: Yes, Your Honor. I won't be very long. The nub of the IIED claim is right here. It's "Pal's

Snub Made Delp Do It. Boston Rocker's Ex-Wife Speaks."

Telling people that it is saying what Micki Delp said.

What Micki Delp said is I've recorded—this is the essence of the IIED claim—is a statement which, A, has [1-40] been found to be not of and concerning Tom Scholz; B, not accusing him of anything. So, that's the IIED claim. That a headline which clearly says that it is reporting her opinion, "Boston Rocker's Ex-Wife Speaks," which Judge Cratsley has already ruled is not of and concerning Scholz—doesn't mention Scholz—and does not accuse him of anything, that is the source of the IIED claim, the intentional infliction of emotional distress.

Let me begin with the flatly false assertion that was made last time in response to a question that you posed, which is in the transcript. At Page 90, and you may recall this, you asked Mr. Carter if there could be an IIED claim based on the defamation claim if the statement was not defamatory?

And Mr. Carter nodded and replied "even if it's not defamatory."

No, that's absolutely false. In fact, where an emotional distress claim is based on a claim of defamation, if the defamation claim fails for any of the five reasons, it's not of and concerning, it doesn't accuse him of defamatory wrongdoing, it's not a statement of fact but rather a statement of opinion, it's not false or it's not uttered with actual malice, any one of those five, the emotional distress claim has to be dismissed as a matter of law.

[1-41] Two United States Supreme Court cases, the *Hustler* case, the *Snyder v. Phelps* case, which was this

picketing by the somewhat unusual—the Westborough Church. Perhaps the Court remembers that case, 2011. The *Howell* case, a case that the Court had. The *Boyle* case decided by the Appeals Court. All of them say that.

So, when you're told that if it's not defamatory it can still proceed, it's just simply wrong.

But then we turn to what Mr. Scholz has to establish here. Let's assume that the defamation claim or any piece of it survives. Contrary to what he suggests, he can't simply say, oh, I was really upset by what was said and I'm therefore entitled to a jury trial.

It's not as though the Court is a potted plant when it comes to any claim, let alone an IIED claim, a "rare," quote/unquote, "claim" involving a stringent standard of proof.

The Herald must have engaged in conduct which, number one, the familiar language is, quote, "extreme and outrageous, beyond all possible bounds of decency, and were utterly intolerable in a civilized community."

How do they meet that standard? A celebrity takes his life. The Herald interviews his former wife and she makes statements, she gives her view, which is not of and concerning him and not defamatory of him, according to Judge [1-42] Cratsley, and that's extreme and outrageous, utterly intolerable in a civilized society? It's exactly what society, what a civilized society—which promotes and protects free expression. It's not—it doesn't meet that standard.

Second, Scholz has to show these articles caused him—again, the familiar standard—emotional distress that was so severe that no reasonable person

could be expected to endure it. That's the familiar standard.

And third, Scholz has to demonstrate that it was the Herald's conduct which actually caused that emotional distress that was so severe that no reasonable person could be expected to endure it.

So, here's what the indisputable, undisputed facts are however they're spun. Beginning years before March of 2007 and right up until the day that the articles are published, Scholz's doctors diagnosed and treated him for the following diseases and degenerative conditions. And I'm mindful—all of which he had the day before the articles were published.

Adrenal exhaustion, advanced Lyme disease, chronic fatigue, degenerative disc disease of the lumbar spine and the cervical spine, stress and chronic anxiety, insomnia, cognitive and neurological dysfunction, irritable bowel syndrome and gastritis, entamoeba histolytica, which is an [1-43] internal parasite which causes abdominal pain and diarrhea and bleeding which he's had ever since, degenerative joint disease and degenerative arthritis, acetaminophen toxicity, which according to him—which is Tylenol toxicity, wreaked havoc on his internal organs, according to Scholz, and a degraded immune system.

We have the records of that. They're not disputable. We have the records of what he was informing his doctors in the weeks and months before that article came out which included, quote, "severe fatigue all the time, feeling overwhelmed, mood swings, mental and psychological issues, sleep problems and high stressed," quote/unquote.

In the nine months before that article was published, he was on approximately 12 separate narcotic

and non-narcotic prescription drugs, including pain killers. One of his five or six treating physicians wrote that he was—he had been chronically maintained on pain killers for years.

And a few months before the articles, he goes to his primary care physician, according to the notes and according to the testimony of the primary care physician and according to Mr. Scholz's own admission, and he tells the physician and I quote, "my neurotransmitters are out of whack." That was immediately before the articles.

Now, in light of the requirement that he produce [1-44] evidence that the Herald articles caused him emotional distress that was so severe that no reasonable person could be expected to endure it, we then—it's undisputed that after the articles came out, he had the exact same catalog of diseases which he has had up until this day that I've just gone through.

He's on the exact same 12 or so prescription drugs as before, except that in addition he was also diagnosed with Disease A. And in addition, he was diagnosed with another disease which his doctors state was potentially life threatening.

So, let's look at the element of so severe that no reasonable person could be expected to endure it. Here's what's undisputed. It's undisputed that after that article comes out, he never sees a psychiatrist. He never sees a psychologist. He never sees a therapist. He never sees a counselor. No doctor diagnoses him with depression. No doctor advises him to get psychological help. And he doesn't tell any doctor that he needs psychological help.

Passing that by—and you have heard a bit about this—even more fundamentally, after these articles

come out, despite the fact that he now comes before the Court and claims—files a claim for IIED, he certifies five times to the United States of America on a government form that he is not suffering from any emotional or mental issue of any [1-45] kind. That's his certification.

So severe that no reasonable person could be expected to endure it? He's certifies five times every year after those articles are published that he has no emotional issues—forget about severe—none, or mental issues of any kind. So, he can't meet that element either.

Finally, assuming that he had shown that he was suffering from emotional distress so severe that no reasonable person could be expected to endure it, given the pre-existing diseases and diagnoses and the 12 prescription drugs and the neurotransmitters that were out of whack and all the rest of it before, under Massachusetts law he has to produce expert testimony that the Herald articles caused any change of in his pre-existing conditions in a fashion that caused severe emotional distress that he didn't have before.

That's impossible for him to do for reasons which include the ones that I've already given, but they also include the fact that he has filed five separate lawsuits, five separate lawsuits since that article was published against other people, filing claims with other judges like yourself, stating in the judicial pleadings that these other people are the ones who caused him emotional distress, not the Herald.

And that's not even including all the people that he has accused of causing emotional distress which did not [1-46] involve lawsuits. Like he asserts that Emily Rooney, the journalist, caused him emotional distress

by referring to him on television as kooky. I haven't counted that. Just the lawsuits alone against other people since then saying I've got emotional distress and you have caused it, you the moderator of the website, you Barry Goudreau, you Micki Delp, you Connie Goudreau, you Jane Doe, all of you people are the ones who have caused me the emotional distress.

They have tried to slide this deficiency past Your Honor by submitting an affidavit from a doctor-lawyer who has never treated Scholz, and so far as the record discloses, has never spoken to Scholz, who does not say that the Herald articles caused him emotional distress and it requires a careful reading.

What he says is that when he reviews the record, he sees evidence that after March 2007 his condition was worse than before. And it looks like, well, that should do it. But it doesn't. There are a series of cases which say, oh, no, no, no, you can't do that where there are pre-existing conditions. You can't simply say, oh, subsequent in time, now, the conditions are worse than they were earlier.

There's a Latin phrase for it which I can't remember, but basically it's the—it's a rejected theory of law. You can't do it. Where there are pre-existing conditions say these judges, said Judge Zobel, say the First Circuit, [1-47] say a series of cases in a package that we will with your permission give to you when I sit down—which will be momentarily—the holding is that where there are pre-existing conditions, you've got to—you can't get up and say I think I'm worse and I think it's as a result of the Herald.

You have to have expert testimony that says that is what caused the change, the worsening in the pre-existing conditions. And here it would have to be the

worsening which was so—that suddenly made it for the first time so severe, et cetera.

I'll stop with that and say that we'll give you these cases. And even if the defamation claim remained in any part, the IIED claim would have to—we would be entitled to summary judgment for each of those several elements. With your permission, I'll give you these cases and then I'll sit down.

THE COURT: Thank you, Mr. Robbins.

MR. J. ROBBINS: Thank you, Your Honor.

THE COURT: Mr. Carter.

MR. CARTER: I'll just—

MR. LIPCHITZ: Just very, very quickly.

THE COURT: Sure.

MR. LIPCHITZ: Just so you know what you have. You have one package, the *Hustler* case and its progeny, which [1-48] deal with defamation and IIED intersection. And the second batch deals with intentional infliction of emotional distress and the issue of causation.

THE COURT: Thank you. Thank you, Mr. Lipchitz.

MR. CARTER: I would just start, Your Honor, at the last point that Mr. Robbins made. And that is that you cannot proceed without an expert where you have pre-existing conditions.

And the case of—sorry—the case of *Gardner v. Simpson*, it's a Judge Saylor case from this federal district, makes that point—makes the exact opposite point that in that case a person—may I pass this up to Your Honor?

THE COURT: Yes.

Mike, I'll take it.

MR. CARTER: In this case, one of the plaintiffs did have a pre-existing condition of depression and headaches. There was a fire incident that was traumatic to that plaintiff and the Court says regarding this that "although she is not presenting any expert or other evidence beyond her affidavit to show causation, these symptoms are sufficient for the claim to survive summary judgment.

Whether the fire aggravated Iacco's"—this plaintiff's—"depression and headaches is a question that can be capably determined by the jury."

[1-49] And that same point or a similar point is made in the *Cady v. Marcella* case that—and the *Levesque* case which is a Judge Neal case—these are cited in our papers—that you do not need an expert to prove that you've been harmed by a traumatic incident.

When a major metropolitan paper in your hometown of Boston puts something like this on the front page or then has "Inside Brad Delp's Suicide"—"Behind Brad Delp's Suicide," and then multiple articles about Brad Delp's suicide conveying to the entire New England region, which is Tom Scholz' home base, that you are responsible for this, that is outrageous and that is devastating and a jury should be allowed to make that determination.

This court, albeit Judge Cratsley, previously did review the articles and did conclude that the notion that somebody is blamed publicly for someone else's suicide, as he concluded these articles had done, would constitute extreme and outrageous conduct, certainly enough at that point to get beyond a motion to dismiss, but there should be no difference in the analysis here,

and we submit that we absolutely do not need an expert to make that point.

We actually have presented and disclosed an expert to say that these symptoms are consistent with—the symptoms that Tom Scholz had after these articles of severe stress, anxiety, worsened insomnia—that these are consistent with [1-50] a traumatic incident. And I submit that the accusation—the multiple accusations in these articles over a period of time—and now over a period of years because they have published, you know, new articles subsequently to rekindle the original articles—that that would be devastating and would cause somebody to suffer deeply, as Tom Scholz has, and as he has submitted in his testimony, five days of depositions, in his affidavits. People who know him have observed the devastation this has caused him emotionally.

In fact, his medical records indicate that on the day this article came out on March 16, his doctor prescribed to him for the first time Ativan, an anti-anxiety medication.

Within a few weeks of these articles being published in March 2007, he reported to his doctor that he was suffering from the most severe stress in his life.

So, I don't think there can be any doubt. And certainly it's at the very least a fact question whether or not Tom Scholz suffered from these articles. That's a question for the jury.

And the Herald has provided evidence and we have provided contrary evidence that puts that issue—puts that question at issue. And that's ultimately a jury question whether he suffered and how severe was that suffering, and that should be submitted to a jury for resolution.

We've laid out—and I would just cite to our papers, [1-51] in particular the Fact Statement, Paragraphs 110, 112 and then 117 to 224, the enormous volume of materials and testimony that support the devastation that this caused to Tom Scholz; the impact it had on his marriage; he had recently been married only two to three months before these articles came out; the impact, negative impact, that had on that relationship; his inability to go in public without the embarrassment of these articles and being known as somebody who had according to the articles and then the subsequent media play on them, that he had murdered Brad Delp. So, those papers will suffice to establish that point.

There were subsequent losses, but I think—and even the impact that these articles had, he is a person who—well, let me back up.

After these Herald articles, at that point, he was devastated and vulnerable. So, when there were subsequently allegations regarding his treatment of band members, that resurrected for him the impact of these articles and he did pursue those, which is his legal right to do. But it doesn't in any way take away from what he has ascribed as these articles being the most devastating attack on who he is as a person, which is the most important thing to him, as opposed to whether he's a good guitar player or something like that.

The notion that he is such a cruel individual that he [1-52] would somehow exert this unbelievably negative influence on Brad Delp to the point where he would kill himself, well, that was something that was intolerable and did destroy him emotionally.

Lastly, I would just say that there have been—even in connection with the IIED argument, the notion that Judge Cratsley's summary judgment decision has decided anything with respect to the impact or the connection between these statements in the articles and the Herald as a defendant is false.

And Judge Cratsley made that clear in his decision. That decision was focused on the six statements only as they concerned Micki Delp. However, the Court made clear the Herald went beyond and linked it all to Tom Scholz. So, that statement on the front page, "Pal's Snub Made Delp Do It," if you took that by itself, perhaps not actionable.

But when the—when you look at the article both that day, the prior article, the July 2nd article, and other statements by the Herald, then in the totality of those circumstances which is the analysis, then the Herald has done wrong, has implicated Tom Scholz in these outrageous statements, and Tom Scholz should be allowed a day in court. Thank you, Your Honor.

THE COURT: Thank you very much. I'm going to take the matter under advisement.

[1-53] You told me, Mr. Robbins, it was going to be argued at the Appeals Court, the other matter, on December 4th?

MR. J. ROBBINS: December 6th, I think, Your Honor.

THE COURT: Okay. So, you can't anticipate getting a decision before the end of March, I guess; right?

MR. J. ROBBINS: That's correct.

MR. CARTER: Yes.

THE COURT: Okay. So, shall we—shall we give it a date, a status date, in early April?

MR. J. ROBBINS: Sure.

MR. CARTER: Sure.

THE COURT: All right. So, let's pick a date in early April and all meet again. And if for some reason you get a decision earlier, you'll let me know and we'll bring it in earlier. But why don't we put it on for—how about April 8th, it's a Monday.

MR. J. ROBBINS: I'm sure that's fine, Your Honor.

MR. CARTER: I'm sorry, which date?

THE COURT: Monday, April 8. I think the holidays would be all over then.

MR. CARTER: I think that's okay, Your Honor.

THE COURT: Okay. So, Melissa, we're going to put this on Monday, April 8th for a status review.

MR. CARTER: At what time did you say?

THE COURT: Two o'clock, please.

[1-54] MR. CARTER: Two o'clock.

MR. J. ROBBINS: Thank you, Your Honor.

THE COURT: All right. Counsel, thank you very much.

MR. CARTER: Thank you very much, Your Honor.

THE COURT: Thanks to all the parties. I'm going to endeavor to turn this around as quickly as possible. But you can't do anything anyway until the end of March, so I'm going to make sure that we give it a good review, as is required, as it deserves. Okay.

COUNSEL: Thank you, Your Honor.

THE COURT: Under advisement. In recess.

(Proceedings adjourned at 3:24:17 p.m. on JAVS audio recording.)