

COMMONWEALTH OF MASSACHUSETTS  
APPEALS COURT

NO. 2012-P-0450

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

v.

MICKI DELP,  
Defendant/Appellee

---

ON APPEAL FROM A JUDGMENT OF  
THE SUFFOLK SUPERIOR COURT

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

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	iv
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	1
FACTS.....	4
A. Mr. Scholz' and Mr. Delp's Work with BOSTON.....	4
B. Mr. Delp's "Victimization" of His Fiance's Sister.....	6
C. Mr. Delp's Suicide & Its Aftermath.....	9
D. The Herald's March 15, 2007 Article....	11
E. The Herald's March 16, 2007 Article....	12
F. The Herald's March 24 Revision.....	15
G. Proceedings Below.....	15
H. The Superior Court's Summary Judgment Decision.....	17
SUMMARY OF THE ARGUMENT.....	19
ARGUMENT.....	20
I. Ms. Delp's Statements to the Herald Conveyed the Defamatory Message That Mr. Scholz Caused Mr. Delp's Suicide..	20
A. Disputed Material Facts Existed Regarding Whether the Herald Was the Source of the Defamatory Sting of the March 16 Article.....	21

B.	Viewed Under the Correct Legal Standard, Ms. Delp's Comments to the Herald Were Plainly Defamatory.....	23
C.	Ms. Delp's Comments Were Of and Concerning Mr. Scholz, and Were Widely So Understood by the Public.....	26
II.	Mr. Scholz Introduced Sufficient Evidence to Withstand Summary Judgment on Whether Ms. Delp's Comments Were Knowingly False or Made with Reckless Disregard for Their Truth or Falsity.....	30
A.	Ms. Delp's Comments to the Herald Were Sufficiently Factual in Nature that They Could Have Been Spoken with Actual Malice.....	31
B.	There Was Sufficient Evidence of Actual Malice to Preclude Summary Judgment in Ms. Delp's Favor.....	35
1.	Ms. Delp's false denial that she made the most damaging of the statements could lead the jury to infer that she knew her statements were false.....	36
2.	The Superior Court disregarded evidence that Ms. Delp herself admitted that she did not know why Mr. Delp killed himself.....	41
3.	Other evidence, including Ms. Delp's spoliation of evidence, supported an inference of actual malice.....	44
4.	Ms. Delp's overstating her familiarity with the reasons for Mr. Delp's death showed a reckless disregard for the truth....	45

5. The foregoing circumstances combined with evidence of Ms. Delp's common law malice, was persuasive evidence of knowing falsity or reckless disregard... 48

CONCLUSION..... 50

CERTIFICATE OF COMPLIANCE..... 51

ADDENDUM..... following

TABLE OF AUTHORITIES

CASES	PAGE
<u>Boyd v. Schwan's Sales Enters., Inc.</u> , 23 S.W.3d 261 (Mo. Ct. App. 2000) .....	39
<u>Cape Publications, Inc., v. Adams</u> , 336 So.2d 1197 (Fla. App. Ct. 1976) ....	39
<u>Carson v. Allied News Co.</u> , 529 F.2d 206 (7 <sup>th</sup> Cir. 1976) .....	43
<u>Celle v. Filipino Reporter Enterprises, Inc.</u> , 209 F.3d 163 (2d Cir. 2000) .....	41
<u>Commonwealth v. Althause</u> , 207 Mass. 32 (1910) .....	33
<u>Eyal v. Helen Broadcasting Corp.</u> , 411 Mass. 426 (1991) .....	27
<u>Flesner v. Technical Communications Corp.</u> , 410 Mass. 805 (1991) .....	31, 39
<u>Flowers v. Carville</u> , 301 F.3d 118 (9 <sup>th</sup> Cir. 2002) .....	38
<u>Godabout v. Cousens</u> , 396 Mass. 254 (1985) ...	31
<u>Goldwater v. Ginsburg</u> , 414 F.2d 324 (2d Cir. 1969) .....	47
<u>Harte-Hanks Communications, Inc. v. Connaughton</u> , 491 U.S. 657 (1989) .....	36, 46
<u>Holbrook v. Casazza</u> , 204 Conn. 336, 528 A.2d 774 (1987) .....	48
<u>Hubbard v. Allyn</u> , 200 Mass. 166 (1908) .....	26
<u>Hutchinson v. Proximire</u> , 443 U.S. 111 (1979) .....	35
<u>Jones v. Taibbi</u> , 400 Mass. 786 (1987) .....	23

<u>King v. Globe Newspaper Co.,</u> 400 Mass. 705 (1987) .....	30, 42
<u>LeBeau v. Town of Spencer,</u> 167 F. Supp. 2d 449 (D.Mass. 2001) .....	44
<u>Lyons v. New Mass Media Inc.,</u> 390 Mass. 51 (1983) .....	35, 46, 49
<u>Masson v. New Yorker Magazine, Inc.,</u> 501 U.S. 496 (1991) .....	22
<u>McAvoy v. Shufrin,</u> 401 Mass. 593 (1988) .....	39, 40
<u>McNamee v. Jenkins,</u> 52 Mass. App. Ct. 503 (2001) .....	31, 35, 38, 47
<u>McRae v. Afro-American Co.,</u> 172 F. Supp. 184 (E.D. Pa. 1959), <u>aff'd</u> 274 F.2d 287 (3d Cir. 1960) .....	21
<u>Murphy v. Boston Herald, Inc.,</u> 449 Mass. 42 (2007) .....	passim
<u>New England Tractor-Training of Conn., Inc.</u> <u>v. Globe Newspaper Co.,</u> 395 Mass. 471 (1985) .....	23, 27, 29
<u>Phalen v. May Dep't Stores Co.,</u> 443 Mass. 52 (2004) .....	21
<u>Poland v. Post Publishing Co.,</u> 330 Mass. 701 (1953) .....	25
<u>Reilly v. Associated Press,</u> 59 Mass. App. Ct. 764 (2003) .....	21, 23, 34
<u>Robertson v. McCloskey,</u> 666 F. Supp. 241 (D.D.C. 1987) .....	39
<u>Rutt v. Bethlehems' Globe Publ. Co.,</u> 335 Pa. Sup. Ct. 163, 484 A.2d 72 (1984) .....	21

<u>Sharratt v. Housing Innovations, Inc.,</u> 365 Mass. 141 (1974) .....	26, 27
<u>Smith v. Suburban Restaurants, Inc.,</u> 374 Mass. 528 (1978) .....	26
<u>Snitowsky v. NBC Subsidiary (WMAQ-TV), Inc.,</u> 696 N.E.2d 761 (Ill. App. 1998) .....	47
<u>St. Amant v. Thompson,</u> 390 U.S. 727 (1968) ..	47
<u>Stanton v. Metro Corp.,</u> 438 F.3d 119 (1 <sup>st</sup> Cir. 2006) .....	34
<u>Stokes v. CBS,</u> 29 F. Supp. 2d 992 (D.Minn. 1998) .....	48
<u>Stone v. Essex County Newspapers, Inc.,</u> 367 Mass. 849 (1975) .....	30
<u>Suzuki Motors Corp. v. Consumers Union of</u> <u>U.S., Inc.,</u> 330 F.3d 1127 (9 <sup>th</sup> Cir. 2002), <u>cert. den.</u> 540 U.S. 983 (2003) .....	47, 49
<u>Tech Plus, Inc. v. Ansel,</u> 59 Mass. App. Ct. 1222 (2003) .....	32
<u>Torgerson v. Journal/Sentinel, Inc.,</u> 210 Wisc. 2d 524 (1997) .....	45
<u>Tosti v. Ayik,</u> 394 Mass. 482 (1985) .....	36, 43, 44
<u>Vanderburg v. Newsweek, Inc.,</u> 441 F.2d 338 (5 <sup>th</sup> Cir. 1971) .....	43
<u>Westmoreland v. CBS, Inc.,</u> 596 F.Supp. 1170 (S.D.N.Y. 1984) .....	46
<u>Zerangue v. TSP Newspapers, Inc.,</u> 814 F.2d 1066 (5 <sup>th</sup> Cir. 1987) .....	39

Other Authorities

Establishing Constitutional Malice for Defamation and False Light Privacy Claims When Hidden Cameras and Deception are Used By the Newsgatherer, 22 Loy. L.A. Ent. L. Rev. 327 (2002) ...	39, 46, 47, 48
<u>O.W. Holmes, Jr., The Common Law</u> (1881) .....	29
<u>Restatement (Second) of Torts,</u> § 580A Comment d (1977) .....	48

## STATEMENT OF THE ISSUES

I. Whether the Superior Court erred in granting summary judgment for the defendant in a libel case based on findings that certain comments the defendant made to a newspaper were not defamatory where the comments falsely conveyed that the plaintiff had caused the suicide of a longtime friend and associate.

II. Whether the Superior Court erred in holding that there were no disputed facts about whether the defendant made her comments with knowledge that her statements were false or with reckless disregard for their truth or falsity where there was substantial evidence to the contrary.

## STATEMENT OF THE CASE

This is a defamation case. In March, 2007, the defendant, Micki Delp, told the Boston Herald ("The Herald") that the plaintiff, Donald Thomas Scholz, had, as a matter of fact, caused her ex-husband, Brad Delp, to commit suicide. Mr. Delp was an astonishing talent who for more than twenty years was lead singer of the hugely successful rock band BOSTON. Ms. Delp divorced Mr. Delp in 1996 over his frequent debilitating episodes of depression and other mental health issues. Mr. Scholz is BOSTON's founder, the producer of its many multi-platinum albums, and its primary songwriter. On March 9, 2007, Mr. Delp asphyxiated himself in the bedroom of his Atkinson, New Hampshire home, leaving behind suicide notes to friends and relatives, including one to Ms. Delp.

Ms. Delp's defamatory comments were published in the March 16, 2007 Herald. The headline to the

Herald's March 16 article read (with emphasis supplied) "Pal's Snub Made Delp Do It: BOSTON rocker's ex-wife speaks." Record Appendix ("A") at 117. The article, which is quoted at length at 13-14 below, reported (based on Ms. Delp's supposed inside knowledge) that Mr. Delp's suicide was caused by the "pressures" in his professional life. Ms. Delp's comments conveyed that the source of those pressures was Mr. Scholz, BOSTON's guiding force for more than 20 years.

Mr. Scholz had nothing to do with Mr. Delp's death. Falsely claiming that one person drove another person to kill himself, as a matter of fact based on alleged inside information, is self-evidently the sort of remark which would tend to hold the accused up to "scorn, hatred, ridicule, or contempt" in the community. Indeed the public vitriol directed at Mr. Scholz in the aftermath of Ms. Delp's statements was immediate and devastating.

Nevertheless, the Superior Court (Cratsley, J.) granted Ms. Delp's Motion for Summary Judgment. The court did not doubt that the articles themselves were defamatory. Instead, the court found that the statements attributed to Ms. Delp were not the source of the defamation. The court made this finding despite the existence of substantial evidence that Ms. Delp's statements were widely read to finger Mr.

Scholz as the cause (or at least a major contributing cause) of Mr. Delp's death. The Superior Court also erroneously held that there was insufficient evidence to raise a triable question about whether Ms. Delp made her comments with 'actual malice,' that is, with knowledge that they were false or with reckless disregard for their truth or falsity, based in large measure on the premise that the comments were not about Mr. Scholz at all.

The Superior Court's theory that the Herald distorted Ms. Delp's comments has much to recommend it. It might even be the truth. At the same time, however, there was significant conflicting evidence. While Ms. Delp insists that she did not say some of the things that the Herald attributed to her, the Herald's reporter insisted that the article accurately reflected what Ms. Delp said. A jury might agree with the reporter and might find that Ms. Delp decided to use her fifteen seconds of fame following Mr. Delp's death to settle old scores with Mr. Scholz. Only the night before the Herald's article was published, Ms. Delp told one of Mr. Scholz' associates that she was "f---ing sick" of Mr. Scholz and "was out to get" him. It would not be a stretch for a jury to find that she did exactly that, and that she, not the Herald, was the source of the defamation. It is for the jury, not the court, to decide who libeled Mr. Scholz.

## FACTS

### A. Mr. Scholz' and Mr. Delp's Work with BOSTON

Mr. Scholz is an M.I.T. graduate who in 1975 or thereabouts founded the rock music group BOSTON. A171 at ¶ 2; A509 at ¶ 2. BOSTON has sold tens of millions of records worldwide, and continues to be a successful touring band. A177 at ¶ 20. Mr. Scholz has been the leader of BOSTON since the band's inception, and is well known as such. A172 (Sup. Ct. Rule 9A(b)(5)Statement of Facts) at ¶ 3.

The last time Ms. Delp saw her ex-husband was in 2004 or 2005 when she was passing through Boston. A179 at ¶ 27; A311. At the time of Mr. Delp's death, Ms. Delp had been divorced from Mr. Delp for about eleven years, separated for sixteen years, and their two children were adults. A179 at ¶ 28. They seldom saw each other after the divorce, as Ms. Delp moved the children to the West Coast [cite]. On the rare occasions when Ms. Delp would appear backstage after a West Coast BOSTON concert, Mr. Delp was "visibly ill at ease". A850 at ¶ 4. The last time they spoke on the telephone was February 28, 2007 - nine days before his death. A179 at ¶ 27; A312. In that conversation, they discussed such matters as their daughter and Mr. Delp's preparations for the upcoming tour - what Ms. Delp agreed was "a normal pre-tour conversation".

A314. Before that, she last recalled speaking with him on December 23, 2006, when they talked about their children's Christmas gifts and Mr. Delp's engagement to Pamela Sullivan. A179 at ¶ 27; A314-316.

Apparently, Mr. Delp did not mention Mr. Scholz in either call. Id. As best Ms. Delp could remember, the last time that Mr. Scholz came up was during a November 2006 phone call, wherein Ms. Delp learned that Mr. Delp was "embarrassed" and "extremely upset" over the fact that Fran Cosmo, Mr. Delp's co-lead vocalist, had been dropped from the upcoming BOSTON summer tour. A625.

Mr. Scholz' relationship with Mr. Delp was consistently good.<sup>1</sup> Mr. Delp and Mr. Scholz were both part of BOSTON from the beginning, A789, and for the most part they worked together harmoniously. See, e.g., A441-42 at ¶ 4; A850; A854-55; A861-62.<sup>2</sup>

Mr. Delp never felt pressured by Mr. Scholz to participate in BOSTON. A193 at ¶ 60; A512 at ¶ 4; A505 at ¶ 15; A851 at ¶ 9. He left the band to tour

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<sup>1</sup>Ms. Delp presented much hearsay evidence to the contrary, but the facts here are recited in the light most favorable to Mr. Scholz.

<sup>2</sup> Among other things, they were both committed vegetarians and advocates of peace and non-violence. A178 at ¶ 24; A374. Mr. Scholz both directly and through the DTS Charitable Foundation, Inc. ("DTS") has supported many charitable organizations over the years that were devoted to causes which Mr. Delp supported, including anti-violence and anti-cruelty organizations. A178 at ¶ 22; A510 at ¶¶ 2-5.

with another group for a time, but came back voluntarily. A441-42. When Mr. Scholz was not touring or playing with BOSTON, he was the lead singer for a Beatles tribute band called Beatlejuice and he loved doing that as well. A193 at ¶ 59 ("I don't think of either band as work"). Only two weeks before Mr. Delp's death, he gave an interview with Limelight magazine in which he expressed excitement and optimism over that summer's planned BOSTON tour. A192. As Mr. Delp put it, he thought the tour would "be a lot of fun. I'm very lucky that I get to do this . . . I have a great job and it's just a lot of fun." Id.

B. Mr. Delp's "Victimization" of His Fiancé's Sister

Mr. Delp had a history of panic attacks and he took Xanax from the early 1990's onward. A195 at ¶ 66; A310; A632-634. According to his former fiancée, Patricia Komor, Mr. Delp suffered from anxiety and depression usually coinciding with upsetting events in his personal life. A505 at ¶ 15.

Mr. Delp's personal life had more than its share of upsetting events. Ms. Delp separated from him in 1991. A649. She divorced him in 1996 because, she says, of Mr. Delp's mental health issues. A651-652. In 1996, after their divorce, she moved their two children permanently to the West Coast. A653.

Mr. Delp became romantically involved with Pamela Sullivan in approximately 2000, after Mr. Delp had broken up with Ms. Komor. A195; A504. Mr. Delp and Ms. Sullivan engaged on Christmas Day 2006, and they set a wedding date for August 2007. A384-85. In the summer of 2006, however, Ms. Sullivan had a relationship with another man. A854 at ¶ 3. See also A316; A392-93; A1506 at ¶ 2. Mr. Delp was devastated and "despondent." A856 at ¶ 3; A1034, 1036 ("He said he didn't think he'd be able to recover from it."). He continued to be suspicious and, until early December 2006, he was seeking to install a secret keystroke logger on her computer. A854 at ¶ 3.

Nine days before Mr. Delp's suicide, he was involved in a serious incident between himself and Meg Sullivan, his fiancé's younger sister.<sup>3</sup> A1537-40; A1544-53. In an email, Mr. Delp explained to Meg and her boyfriend, Todd Winmill, his sorrow at having "victimized" Meg and at having (in her words) "hurt [her] to the core." A1551, A1545.

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<sup>3</sup>The record does not specify exactly what took place, but based on court filings after judgment entered in this case, *The Boston Globe* has reported that Mr. Delp taped a camera to the ceiling of Meg Sullivan's bedroom. Meg Sullivan lived in a spare room in Mr. Delp's home. See "Singer's Last Days Detailed in Court Papers," at [www.boston.com/ae/music/2012/05/07](http://www.boston.com/ae/music/2012/05/07), last visited June 4, 2012.

The effect of the incident on Mr. Delp was sufficiently devastating that Meg Sullivan wrote to him, "I am very concerned for you [Brad]" and asked for assurance that "you aren't planning anything harmful to yourself." A1545. Ms. Sullivan was concerned because "he was depressed. I knew he had thought about suicide." A1640. Mr. Delp understood the grave harm he had caused. Only six days before his suicide, he wrote: "I have made a mess of the lives of my three closest friends. I don't know if I will ever forgive myself for that." A1551. Two days later, Mr. Delp at Meg Sullivan's insistence apparently telephoned Pamela Sullivan to tell her what he had done. A1552-53.<sup>4</sup>

On the morning of March 8, 2007, Meg Sullivan and Mr. Winmill went back to Atkinson to remove some of her belongings. A1638. Ms. Sullivan heard Mr. Winmill yelling at Mr. Delp, telling him "he had - that he had done some serious damage to me and to my relationship with Todd . . . he swore at Brad and I think that's all I heard." A1638. Brad was crying and very quiet. A1638-39. "The only things I really heard him say was repeated 'I'm sorries'." A1639.

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<sup>4</sup>As Meg Sullivan wrote to Mr. Delp in an email: "I am concerned for myself, and very much for my sister. I understand how deeply this will hurt her, but I truly believe she needs to know." A1435.

C. Mr. Delp's Suicide & Its Aftermath

That same night, March 8, 2007, Mr. Delp lit charcoal grills in his home and suffocated himself. A1334 (police report). So intent was he on committing suicide that he had arranged a back-up plan; a dryer hose was found hooked to his automobile. A143; A1328. Mr. Delp left behind a suicide note to Pamela Sullivan, one to Meg Sullivan, one to his two children, and one to Ms. Delp (the mother of his children), as well as two public notes, one of which read in part: "Brad Delp. Je suis une âme solitaire. I am a lonely soul." A1331. Another public note, intended for whomever found him, read in part: "I take complete and sole responsibility for my present situation." A1329. In his suicide note to Meg Sullivan and Mr. Winmill, Mr. Delp apologized "for the heartache I have caused you". A 1554.

After Mr. Delp's death, Ms. Delp was involved in drafting two press releases. A180; A318. The first press release, drafted with the help of a publicist, said nothing about suicide, and specified that donations could be made in Mr. Delp's memory to the American Heart Association "hoping that it would divert attention. People would assume that it was a heart attack." A319. By then, Mr. Delp's death had already received substantial attention from the news media. A180; A319. Shortly after Mr. Delp's memorial

service, the Atkinson Police made it known that they would need to release the cause of death. A320-323. Up to this point, Ms. Delp had concealed the cause of death even from Mr. Delp's brothers and sisters.

A323. Ms. Delp and Ms. Sullivan decided to issue a second press release revealing the suicide. A323; A360-362.

On March 14, following the issuance of the second press release, Gail Parenteau, Mr. Scholz' publicist, called Peggy Rose, the publicist who had assisted in issuing the first press release. A425. Ms. Rose told Ms. Parenteau that she was no longer representing the Delp family and had not been responsible for the second press release. A425 at ¶ 6.

A little after 9:00 p.m. that same day, Ms. Parenteau received a call from Ms. Delp. A425 at ¶ 5. According to Ms. Parenteau, she "was screaming at me at the top of her lungs, asking how dare I call the family publicist [Ms. Rose]. Further, screaming, she stated that she was out to get Tom Scholz. She ranted that she was 'f---ing sick of Tom.'" A425 at ¶ 5.

The next morning, March 15, 2007, Ms. Parenteau called Pamela Sullivan because she knew that Ms. Sullivan was close to Ms. Delp. Ms. Parenteau told Ms. Sullivan that Ms. Delp "should not be making threats against [Mr. Scholz]. Pamela told me she agreed with me and said she would speak to Micki."

A425 at ¶ 6. Later that morning, Ms. Delp called Ms. Parenteau again, irate over Mr. Scholz giving an interview to *Rolling Stone* magazine about Mr. Delp's death. A425 at ¶ 7. In that phone call, Ms. Delp said "that she was going to make sure to ruin Tom."<sup>5</sup> A425 at ¶ 7. When Ms. Parenteau called Pam Sullivan to advise her of the conversation, Ms. Sullivan was "appalled" and insisted "that Brad's suicide had nothing to do with Tom." A426 at ¶ 8.

D. The Herald's March 15, 2007 Article

On March 15, the Herald published an article entitled "Suicide Confirmed in Delp's Death." A140. The article informed readers that Atkinson police confirmed Mr. Delp had committed suicide and left behind numerous notes, but said that "the cops were not told why he took his life." Id. It added:

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 '80's. . . . The situation was complicated by the fact that Delp's ex-wife, Micki, is the sister of Goudreau's wife,

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<sup>5</sup>She further insisted that she was "hell bent on doing everything in her power to make sure that people knew that Brad's suicide had to do with his unhappiness with Tom." Id.

Connie.

"Tom made him do the Boston stuff and the other guys were mad they weren't a part of it," said another insider. "He was always under a lot of pressure."

[ . . . ]

But the never-ending bitterness may have been too much for the sensitive singer to endure. . . . 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."

A140-41. The same evening that the Herald story appeared, Ms. Delp was at a restaurant in New Hampshire with her sister, Connie Goudreau, when the Herald called Ms. Goudreau. A182 at ¶ 36; A324-25. Ms. Goudreau declined to be interviewed and hung up. Id. Thereafter, Ms. Delp testified, Ms. Goudreau "called back Gayle Fee for me and handed me the phone." A325.

E. The Herald's March 16, 2007 Article

Ms. Delp's interview with Ms. Fee was the lead story in the next day's Herald. The headline stated: "Pal's Snub Made Delp Do It: BOSTON rocker's ex-wife speaks." A142. The subhead added, "Delp's ex says 'no one can possibly understand'". Id. Unlike the March 15 article, which attributed the information merely to 'insiders,' the March 16 article named Ms.

Delp as the primary source of the information. Id.

The article stated, in pertinent 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 with the Track.

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

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

[ . . . ]

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.

"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."

A142-43. The story could only be understood as describing Mr. Scholz' supposed role in making Mr. Delp's professional life miserable, as blaming that miserable professional life for his suicide, and making clear that one of Mr. Delp's own family members - his ex-wife, the mother of his children and someone in possession of a non-public suicide note, in fact - was the source of the information. As Ms. Delp would later acknowledge at deposition, however, she had "no idea" whether Mr. Delp's romantic life or his mental health issues caused his suicide, and she had no idea whether Mr. Scholz caused it either. A353-54, quoted infra at 43.

Immediately after the article appeared, Ms. Delp's friends "didn't want me to read it first because they knew I'd be upset about it." A334. She was in fact "extremely upset" when she read it. A334. She "immediately called Gayle Fee" and said:

. . . Gayle, you know, I'm stunned by what's in the paper today, and you know that I didn't say this. And, I said, you know, I'm not trying to tell you how to do your job, but I suggest that you contact your legal counsel and straighten that out because that's not what I said.

A335. The reason for her anger, as Ms. Delp explained at deposition, was "I never blamed Tom Scholz for

anything." A338. As Ms. Delp put it elsewhere at her deposition:

Q: So from the time that the offensive article appeared suggesting that you were saying Tom's firing of Fran Cosmo caused Brad to take his life -

A: I didn't say that.

Q: I know. But the article says that, correct?

A: Then it's the article's problem, not mine.

A339.

F. The Herald's March 24 Revision

On March 24, the Boston Herald published yet another article which contained the statement that:

Micki Delp told the Herald that her ex-husband Brad had committed suicide two weeks ago in his bathroom of his New Hampshire home, was under a great deal of pressure personally and professionally. However, Micki Delp never blamed Scholz for his death.

A209. Despite this statement, which also appeared in the Inside Track column and was written by the same reporter who authored the March 16 article, the Herald has never wavered (at least in the litigation) from insisting that Ms. Delp said exactly what the article attributes to her. See, e.g., A413 (Fee Affidavit).

G. Proceedings Below

Mr. Scholz filed his Verified Complaint against Ms. Delp and Ms. Goudreau in Middlesex Superior Court on October 12, 2007. A1. Mr. Scholz amended his

complaint in February, 2008.<sup>6</sup> A120. Ms. Delp moved for summary judgment on November 30, 2009. A157.

In March, 2010, between the time Ms. Delp served her summary judgment motion under Rule 9A and the time it was filed, Mr. Scholz brought suit against the Herald in Suffolk Superior Court based upon the same articles. See A45 (Docket in C.A. 10-1010). There followed a flurry of discovery and motion practice between Mr. Scholz and the Herald, including a motion to dismiss from the Herald and Mr. Scholz' motion to consolidate the two suits. See A18 at Paper 45; A46 at Paper 19. The motion to consolidate was granted, the case against Ms. Delp was transferred to Suffolk, and the consolidated matters were specially assigned to the Hon. John C. Cratsley. See A18 at entry of 10/18/10; A48 at Paper 55.

After consolidation, the Superior Court denied the Herald's motion to dismiss. See A547. The court held that the articles were 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 in Delp's suicide." A556. The court also rejected the Herald's

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<sup>6</sup> The Amended Complaint, among other things, removed the allegations in the original Verified Complaint that Ms. Delp was the source of the Herald's March 15 article as well as March 16 article. She was not. Ms. Goudreau and Mr. Scholz settled soon after the suit was filed and she was dismissed.

argument that the articles were not 'of and concerning' Mr. Scholz, since "individuals who read the articles . . . understood [that] the articles referred to [Mr. Scholz]." A558.

In 2010 and 2011, while discovery was still ongoing in the Herald case, the parties at various times filed supplemental materials in conjunction with Ms. Delp's summary judgment motion (which had not yet been heard). See, e.g., A783; A826; A1427; A1618.

Following oral argument, the Superior Court issued the decision summarized immediately below.

H. The Superior Court's Summary Judgment Decision

The primary basis for granting summary judgment was the court's finding that:

[N]one of the statements of Micki Delp [in the March 16 article] are reasonably susceptible of a defamatory meaning. While the article as a whole could be read by some to contain a defamatory meaning as to Scholz because of the possible leap or inference a reader might make that turmoil in Brad's professional life, possibly caused by Scholz, played a role in Brad's suicide, none of the statements attributed to Micki make that connection, either explicitly or implicitly.

A1650-51. The court went on to hold that Ms. Delp's comment "that Brad was upset over the lingering bad feelings from the ugly breakup of BOSTON" acquired its defamatory meaning only from its context: "the Herald writers, strictly on their own," supplied information about the "fierce falling out" between Mr. Scholz and

certain former band members.<sup>7</sup> A1651 (emphasis supplied). Based on the same analysis, the Superior Court found that none of the statements were 'of and concerning' Mr. Scholz, observing that it was the Herald writers who, "for whatever reason, added Scholz' name and his quotes." A1653. Thus, any defamatory impact was "the Herald writers' doing." Id.

Finally, the Court erroneously held that Mr. Scholz failed to present sufficient evidence that Ms. Delp made her comments with constitutional actual malice.<sup>8</sup> A653. In so holding, the court simply

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<sup>7</sup> For example, after the Herald quoted Mr. Scholz denying that Mr. Delp was unhappy about recent events in the band, the Herald writers "immediately follow Scholz' quote 'nonetheless,' suggesting a possible connection between Scholz and Brad's suicide." A1542. Similarly, the court found that it was not Ms. Delp but the Herald writers, "again possibly seeking to create a connection between Scholz and Brad's suicide," who described Mr. Delp as "constantly caught in the middle of warring factions." A1542. As to the statements about Mr. Delp's 'dysfunctional professional life,' the court found that the Herald, and not Ms. Delp, "create[ed] the connection to Scholz and the possible implication that Scholz was responsible for the 'dysfunction' and thus, Brad's suicide." A1651.

<sup>8</sup>The court's statement that Mr. Scholz had not identified specific evidence in the summary judgment record which raises a dispute as to whether Micki suggestively knew or seriously doubted the truth of her statements is simply inaccurate. Ms. Delp's original Memorandum (at pages 12-20) and her Supplemental Memorandum (at 13-26) discussed the issue extensively and Ms. Delp's original and Supplemental Fact Statement provided the Court with numerous

ignored the evidence summarized in Part II of the Argument below. Accordingly, the Court entered final judgment in Ms. Delp's favor on August 23, 2011. A1657. This appeal timely followed. A1659.

SUMMARY OF THE ARGUMENT

The Superior Court erred in holding that the statements Ms. Delp made to the Herald were neither defamatory nor 'of and concerning' Mr. Scholz. On summary judgment, the court was obliged to give full credit to the Herald reporter's affidavit insisting that the article fairly reflected Ms. Delp's comments. The Superior Court did not doubt that the articles were defamatory, but saw the Herald rather than Ms. Delp as the source of the defamation. [Infra, 21-23.] Even assuming Ms. Delp said nothing more to the Herald than what the articles themselves reproduced, however, her statements conveyed that Mr. Scholz' actions caused Mr. Delp's death. Thus, those statements were defamatory. [23-26] A jury question was also presented as to whether the statements were 'of and concerning' Mr. Scholz, insofar as the public at large certainly read them that way and there was substantial evidence that Ms. Delp intended that her words be understood that way. [27-31]

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instances of the evidence described immediately below in part II below.

The Superior Court also erred in holding that Mr. Scholz failed to raise a triable issue about actual malice. Even if the court were correct that statements needed to be factual before they could be uttered with actual malice, Ms. Delp's statements were provably false. [31-36] The Superior Court also failed to appreciate the probative force of Mr. Scholz' evidence. Quite apart from the evidence that Ms. Delp was 'out to get' Mr. Scholz, the mere fact that none of the suicide notes mentioned or blamed Mr. Scholz would suffice for the jury to infer that Ms. Delp simply fabricated the charges. Her denial under oath and in emails that she blamed Mr. Scholz for Mr. Delp's death is persuasive evidence of knowing fabrication, as is her admission that in sober truth she had no idea whether Mr. Scholz actually caused Mr. Delp's death. [38-45] Mr. Scholz also presented evidence of reckless disregard insofar as Ms. Delp was making her accusations based on suspicions and not facts. [45-50] Thus, on that basis as well the Superior Court's decision must be reversed.

#### ARGUMENT

I. MS. DELP'S STATEMENTS TO THE HERALD CONVEYED THE DEFAMATORY MESSAGE THAT MR. SCHOLZ CAUSED MR. DELP'S SUICIDE.

The test for defamation is whether the offending comments are likely to hold the plaintiff up to scorn

or ridicule or would otherwise tend to discredit the plaintiff in the minds of any considerable and respectable class of the community. Phalen v. May Dep't Stores Co., 443 Mass. 52, 56-57 (2004) "Defamation can occur by innuendo as well as by explicit assertion." Reilly v. Associated Press, 59 Mass. App. Ct. 764, 774 (2003) (internal quotation and citation omitted). The Superior Court understood that accusing Mr. Scholz of being in some measure responsible for Mr. Delp's death easily met the definition of a defamatory statement. A555-57; A1650-51.<sup>9</sup> Instead, the Superior Court held that while the March 16 article was susceptible of a defamatory meaning, Ms. Delp's *comments* were not. That was a jury question.

A. Disputed Material Facts Existed Regarding Whether the Herald was the Source of the Defamatory Sting of the March 16 Article

The critical fact which the court below supplied to the summary judgment record was the conclusion that

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<sup>9</sup>Cases elsewhere agree. See, e.g., Rutt v. Bethlehems' Globe Publ. Co., 335 Pa. Sup. Ct. 163, 174, 484 A.2d 72 (1984) (holding that a newspaper article which could "be construed to imply that appellant had in some way caused or contributed to the apparent suicide of his son" posed a jury issue as to defamation); McRae v. Afro-American Co., 172 F. Supp. 184, 186 (E.D. Pa. 1959), aff'd, 274 F.2d 287 (3d Cir. 1960) (insinuation that a mother caused her daughter to commit suicide because her mother was "extremely displeased over her . . . class standing" was defamatory).

the Herald writers "strictly on their own" had put a defamatory spin on Ms. Delp's remarks. A1651.

However, the Herald reporter primarily responsible for the article denied that was so, and insisted that the article "fairly reflect[ed]" Ms. Delp's comments. See A413.<sup>10</sup> Before the Superior Court could find as a matter of fact that the Herald was the source of the defamation, it would have been necessary to know what Ms. Delp said to Ms. Fee. Reporters do not relate every word that a source utters; they pick and choose - sometimes fairly, sometimes not. See Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 501, 514-516 (1991). The interview was not recorded, and Ms. Fee's notes were not produced.<sup>11</sup>

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<sup>10</sup>Ms. Fee's Affidavit stated, in part:

3. The first paragraph of the Article 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 lead to the sensitive frontman's suicide, Delp's ex-wife said." This statement fairly reflects the substance of what Ms. Delp told me when we spoke in connection with the Article.

A413-14. The remaining paragraphs contained the same assertion as to the rest of the article.

<sup>11</sup>They were apparently erased from the Herald's computer system, a fact known to the motion judge since Mr. Scholz wanted to image the Herald's and its reporters' computer hard drives. A56 at Paper 112; A57 at Order of 2/15/11.

"The existence of defamatory innuendo is a question of fact for the jury to consider." Reilly at 774. Necessarily, the source of the innuendo is also a jury issue. Ms. Delp said one thing; Ms. Fee said something else. In combination with Ms. Fee's affidavit, there was a triable issue about whether the Herald in fact placed innocent words into a defamatory context or whether the context 'fairly reflected' Ms. Delp's comments.

B. Viewed Under the Correct Legal Standard, Ms. Delp's Comments to the Herald Were Plainly Defamatory

Even assuming that Ms. Delp said nothing more to the Herald than what the articles themselves reproduced, her statements were defamatory. Defamatory content is determined from the perspective of the typical reader, and looks to whether a reasonable person could find something defamatory in the language. See New England Tractor-Training of Conn., Inc. v. Globe Newspaper Co., 395 Mass. 471, 483 (1985) ("NETT-Conn."). "The determination whether the communication complained of is capable of a defamatory meaning is for the court. Where communication is susceptible of both a defamatory and non-defamatory meaning, a question of fact exists for the jury." Jones v. Taibbi, 400 Mass. 786, 792 (1987).

In his prior decision on the Herald's Motion to Dismiss, the same motion judge held that the articles at issue were "reasonably susceptible of a defamatory connotation because the articles insinuate, if not suggest, that Delp's successful career, caused in part or in whole by Scholz, played a role in Delp's suicide." A556. The judge added, "one could reasonably understand Scholz to be the source of the longstanding bitterness between BOSTON members." A557. That was precisely right, and when one reads the articles as a typical reader would, Ms. Delp's comments were defamatory even without the Herald's editorial enhancements.

In the lead paragraph, Ms. Delp stated that Mr. Delp had been "driven to despair" after Mr. Cosmo was "dropped from a summer tour, the last straw in a dysfunctional professional life that ultimately led to the sensitive frontman's suicide." A142. There is no equivocation or ambiguity: Ms. Delp told the Herald that dropping Mr. Cosmo caused despair, and that "ultimately" led to suicide. The statement was inarguably false, at least for summary judgment purposes. See A1602, A1641-42 (Meg Sullivan); A503. The quote in the second paragraph elaborated on that theme, and made clear that Mr. Delp's "dysfunctional professional life" was a source of "the pressures [Mr. Delp] was under." A142. Ms. Delp's statement in the

third paragraph that Mr. Delp was in a "predicament" professionally further made clear that the reason Mr. Delp took his own life "before he would hurt somebody else" derived from the despair-inducing working conditions of being the lead singer for one of the most successful rock bands ever.

Ms. Delp may complain that she stopped short of literally naming Mr. Scholz in connection with these statements, but "a defendant in an action for libel is liable for what is insinuated as well as for what is explicitly stated." Poland v. Post Publishing Co., 330 Mass. 701, 704 (1953). Mr. Scholz was widely known as the person who controlled BOSTON's name and activities and Ms. Delp's own fact statement alleged as much. See A172 at ¶ 3. As Ms. Delp put it at deposition, "Tom is BOSTON." A309. Ms. Delp's statement in the article that two former BOSTON members "are family and the things that were said against them hurt" did not name Scholz, but the context makes clear that "the things" that "hurt" were things said *by* Scholz. When Ms. Delp told the Herald that "BOSTON to Brad was a job, and he *did* what he was *told to do*," there could be no reasonable doubt in the minds of any person who knew BOSTON (or any person who had read the Herald's March 15 article) that Mr. Scholz was the one telling Brad what to do. And Ms. Delp's comment that "it got to the point where he just

couldn't do it anymore," following directly on her comments about Mr. Delp's "dysfunctional professional life," lays Mr. Delp's suicide directly to the working conditions in the band, also something that Mr. Scholz controlled. "Inferences which might be drawn by a considerable and respectable segment of the community can make a publication actionable" even if the publication on its face is not. Smith v. Suburban Restaurants, Inc., 374 Mass. 528, 530 (1978). Thus, the issue was not so clear that the Superior Court could say on summary judgment that there was no possibility of a reasonable jury finding that the comments were not defamatory.

C. *Ms. Delp's Comments Were Of and Concerning Mr. Scholz, and Were Widely So Understood by the Public.*

Alternatively, the Superior Court held that Ms. Delp's comments were not 'of and concerning' Mr. Scholz, apparently because they did not directly name him. "Whether the article was published concerning the plaintiff is generally a question of fact." Sharratt v. Housing Innovations, Inc., 365 Mass. 141, 145 (1974), quoting Hubbard v. Allyn, 200 Mass. 166, 171 (1908).

There are two discrete tests for whether a comment is 'of and concerning' a plaintiff. The plaintiff may meet his burden by showing "either that

the defendant intended its words to refer to the plaintiff and that they were so understood, or that the defendant's words reasonably could be interpreted to refer to the plaintiff and that the defendant was negligent in [uttering] them in such a way that they could be so understood." NETT-Conn, 395 Mass. at 483 (emphasis in original). "[T]his articulation of the test poses alternative standards, the first subjective in nature and the second objective." Eyal v. Helen Broadcasting Corp., 411 Mass. 426, 430-433 (1991). Neither test is particularly demanding, especially at the summary judgment stage. See Eyal at 430 (false report about "owner of a Brookline delicatessen" being arrested "in connection with an international cocaine ring" sufficient where defendants intended to refer to plaintiff); Sharrat at 145 (omission of plaintiff architect from commemorative plaque libelous, as it conveyed to those who knew architect that he had not in fact designed building).

As to the subjective test, both prongs were met. Ms. Delp never provided the Court with any verified statement attesting as to whom she was referring, if not Mr. Scholz. Whether or not Ms. Delp's comment that she was "sick" of Mr. Scholz and "was out to get him" sufficed to show actual malice, A425 at ¶ 5, it certainly sufficed to show that Ms. Delp was out to get Mr. Scholz. A jury could find that she did so.

Ms. Delp herself testified that she herself understood the articles to be about Mr. Scholz. A341-42.<sup>12</sup> The day after the article appeared, Ms. Goudreau, Ms. Delp's sister, wrote: "I think [the March 16 article] says what Micki and Pamela wanted to get across without specifically naming Tom." A933. Accordingly, there was a triable issue about whether Ms. Delp intended to refer to Mr. Scholz.

The second prong of the subjective test is satisfied as well. At least some portion of the audience for Ms. Delp's remarks did in fact understand her comments as referring to Mr. Scholz. Internet postings - many of them extraordinarily hateful - echoed Ms. Delp's comments blaming Mr. Scholz for Mr. Delp's death. A456-58; A829-32. Launch Radio Network understood Ms. Delp's remarks in these terms:

The ex-wife of BOSTON singer Brad Delp blames long-standing issues within the band for Delp's suicide. Micki Delp told the Boston Herald that Brad had always been stuck in the middle of fights between band leader Tom Scholz and former members of the group, . . . Micki said the last straw was the recent firing of fellow BOSTON singer Fran Cosmo and his son, guitarist Anthony Cosmo.

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<sup>12</sup>pam Sullivan also understood the remarks that way; she immediately called Mr. Scholz and told him the statements were "a pack of lies." A337. Ms. Rose, the publicist, thought that "Tom is defo the bad guy in this saga" and reported that Ernie Boch, Jr., of the band Ernie and the Automatics, thought the article "made you guys sound legit and Tom a ---hole." A933.

A85-86, A 186. The Launch article was then re-posted on the internet ("Micki Delp said . . . DELP'S WIFE BLAMES SCHOLZ") fueling a new set of anti-Scholz tirades. A450. In another internet thread, one post read, "It seems the master guitar guru was in some part responsible for Brad's 'untimely' death! . . . Turns out Toms [sic] constant acrimony with present and past BOSTON members helped stress Brad out too much! Thanks Tom. [Bleeping] a-hole." A453. Mr. Scholz also was confronted with similar (albeit more restrained) reactions as he went about his daily affairs. A512-14. Hence, there was sufficient evidence that Ms. Delp intended to 'get' Mr. Scholz and that her remarks were so understood.

Ms. Delp's remarks were also actionable under the objective test. The objective test recognizes that a person's "slips are no less troublesome to his neighbors than if they sprang from guilty neglect." NETT-Conn at 476, quoting O.W. Holmes, Jr., *The Common Law* 108 (1881). Under the objective test, Ms. Delp is liable as long as her remarks could be reasonably understood as referring to Mr. Scholz (whether she wanted them to or not). "[T]he question is not so much who was aimed at as who was hit." NETT-Conn at 478 (internal quotation and citation omitted). At the time Ms. Delp spoke, the Herald's March 15 article was fresh in the Herald's readers' minds. That article had

depicted Mr. Delp as "the man in the middle of the bitter break-up of BOSTON - pulled from both sides by divided loyalties." A140. Ms. Delp was not responsible for that article, but when she picked up Ms. Goudreau's phone to talk to Ms. Fee, she knew she was not painting on a blank canvas, either. Thus, Mr. Scholz' evidence was therefore more than sufficient to show that the trier of fact could conclude that the articles were 'of and concerning' him.

II. MR. SCHOLZ INTRODUCED SUFFICIENT EVIDENCE TO WITHSTAND SUMMARY JUDGMENT ON WHETHER MS. DELP'S COMMENTS WERE KNOWINGLY FALSE OR MADE WITH RECKLESS DISREGARD FOR THEIR TRUTH OR FALSITY

The Superior Court also granted summary judgment for Ms. Delp on the issue of actual malice. To act with actual malice, one need only utter a statement with knowledge of its falsity or with "reckless disregard for its truth or falsity." Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 867 (1975). Although Mr. Scholz will bear the burden at trial of showing actual malice by clear and convincing evidence, the court does not independently weigh the evidence on summary judgment. Rather, the usual standard remains fully intact, with all inferences drawn in the plaintiffs' favor. See King v. Globe Newspaper Co., 400 Mass. 705, 721 (1987) (court reviewed summary judgment materials to determine whether, "considered with an indulgence in the

plaintiff's favor, they may demonstrate to a jury to a clear and convincing degree the presence of actual malice"). Findings about credibility and state of mind are particularly disfavored. See Flesner v. Technical Communications Corp., 410 Mass. 805, 809 (1991). The principle applies in defamation cases as well. Godabout v. Cousens, 396 Mass. 254, 258 (1985); McNamee v. Jenkins, 52 Mass. App. Ct. 503, 506 (2001).

Here, the court made two independent errors in granting Ms. Delp's motion. First, it incorrectly held that only one of Ms. Delp's statements were sufficiently 'factual' to have been spoken with actual malice. Second, it failed to recognize that Mr. Scholz presented sufficient evidence of reckless disregard or knowing falsity to survive summary judgment.

A. Ms. Delp's Comments to the Herald Were Sufficiently Factual in Nature That They Could Have Been Spoken with Actual Malice

In his decision on the Herald's Motion to Dismiss, the motion judge correctly determined that the statements in the article which blamed Mr. Scholz for Mr. Delp's death were either factual in nature or, if they were opinions, were opinions which implied the existence of false facts. A559.<sup>13</sup> The court did not

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<sup>13</sup>As the court put it:

The column's very name, Inside Track, indicates that it conveys inside information, that is

reverse itself in its summary judgment decision, but it did posit that with only one exception, Ms. Delp's statements could not even be subject to an actual malice analysis because she could not "possibly have made [them] falsely or with reckless disregard of the truth." A1654. The court cited no authority for the proposition that statements must be 'factual' to be made in good faith. More importantly, Ms. Delp's statements were all factual in nature.

Ms. Delp's statement that Mr. Delp was "upset" about Fran Cosmo being "disinvited" was a factual statement. "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. 1222 (2003). The statement was provably false; Mr. Delp's good friend, Keith Belair, recalls that Mr. Delp "joked" about re-doing the vocal lines without Mr. Cosmo and that "Brad was in good humor and showed absolutely no signs of stress

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information not available to the general public. Furthermore, the articles attribute statements to multiple unknown "insiders," as well as Delp's ex-wife Micki. An average reader could presume that because the sources cited in the articles were "insiders," 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.

A 559.

or upset about Fran Cosmo's not singing with BOSTON."<sup>14</sup>  
A503 at ¶ 5.

Similarly, the statement that Mr. Delp was "upset over lingering bad feelings from the ugly breakup of the band BOSTON over 20 years ago" was also factual. "The state of a man's mind is as much a fact as the state of his digestion." Commonwealth v. Althause, 207 Mass. 32, 48, (1910) (internal quotation and citation omitted). Mr. Delp was not still 'upset' over Boston's break-up, and even Ms. Delp admitted as much. See A343. Similarly, Ms. Delp's statement that Mr. Delp "did what he was told to do" but "got to the point where he just couldn't do it anymore" amounts to the assertion that Mr. Delp couldn't stand to take any more orders from Mr. Scholz. That too was a 'fact' - and a false fact. See A192-93; A429-39. See also A426 (in twenty years, Mr. Delp did not "in any way indicate that Tom was pressuring [him] to do anything he did not want to do."). The statement that no one could "possibly understand the pressure [Brad] was under" was plainly not intended in its most literal sense, but rather to convey, in the context of Ms. Delp's other statements, that working conditions in

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<sup>14</sup>Because Mr. Delp had written suicide notes to Ms. Delp and her children, Ms. Delp presumably was in a position to know whether he was or wasn't upset. As discussed below, the suicide notes told Ms. Delp that her statements weren't true; none of them mentioned Mr. Scholz or BOSTON.

BOSTON were unimaginably awful and took a predictably severe toll. That too was factual, provably false. See A503, 861-62 (Kilbashian) ("when Brad confided in me the difficulties he was having in his life in the period leading up to his suicide, Tom was not a factor and not mentioned."). Indeed, Mr. Delp's Limelight interview, conducted only a few weeks before the tour was due to start showed a musician brimming with confidence and looking forward to playing with BOSTON. A192-93; A430-39. Finally, the overall sting of the article - that Mr. Scholz caused Mr. Delp's death - was also factual. See Reilly at 772-73 (Boston Herald article that accused veterinarian of causing dog's death by playing golf instead of attending to medical duties was sufficiently factual to be defamatory). Juries in criminal cases and wrongful death cases decide every day whether someone caused another's death. In light of the evidence concerning Mr. Delp's lifelong depression and the events which had taken place in his personal life as recently as the morning of his death, the thrust of her comments as a whole were also false, at least for summary judgment purposes.

Ultimately, the Superior Court did precisely what the cases counsel that judges (and juries) should not do; take each statement out of context and read it as though it were a contract or a statute. See Stanton

v. Metro Corp., 438 F.3d 119, 127 (1<sup>st</sup> Cir. 2006) and cases cited. All of Ms. Delp's statements, taken collectively, convey that Ms. Delp, as a matter of fact, knew why Mr. Delp killed himself. If she knew they were false or spoke them without particularly caring whether they were true or false, that would suffice for actual malice. See Murphy v. Boston Herald, Inc., 449 Mass. 42, 57-58 (2007). Thus, Ms. Delp's statements were susceptible of being made with actual malice.

B. There Was Sufficient Evidence of Actual Malice to Preclude Summary Judgment in Ms. Delp's Favor

"The proof of 'actual malice' calls a defendant's state of mind into question . . . and does not readily lend itself to summary disposition." Hutchinson v. Proximire, 443 U.S. 111, 120 n.9 (1979). Reckless disregard of the truth may be found where there is evidence that the statement was published without investigation or verification or with only secondhand knowledge. Lyons v. New Mass Media Inc., 390 Mass. 51, 57 (1983). "The inquiry is a subjective one as to the defendant's attitude toward the truth or falsity of the statements rather than the defendant's attitude towards the plaintiff." McNamee, 52 Mass. App. Ct. at 506. Since defendants rarely admit that they have serious doubts about the truth of their utterances, juries may (and usually must) infer actual malice from

objective (circumstantial) evidence. Murphy, 449 Mass. at 57-58; Tosti v. Ayik, 394 Mass. 482, 494-95 (1985). See also Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 658 (1989). Here, there was "an abundance of evidence that taken cumulatively" showed actual malice. Murphy at 58.

1. Ms. Delp's false denial that she made the most damaging of the statements could lead the jury to infer that she knew her statements were false.

Ms. Delp testified at deposition that when she first read the Herald's stories, she was "furious." A839. Her anger derived from the Herald attributing to her comments which she did not say and which she believed were not true:

Q: Why were you furious?

A: Because it's not what I said.

Q: What does it say you said that you claim you didn't say?

A: Well, the first sentence is totally wrong because I didn't say that, "Boston lead singer Brad Delp was driven to despair after his long time friend Fran Cosmo was dropped from the summer tour, the last straw in a dysfunctional professional life that ultimately led to the sensitive frontman's suicide, Delp's ex-wife said.

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

A: Nothing, not one word of it.

A839-40. Ms. Delp also denied saying that Mr. Delp was "upset over the lingering bad feelings from the ugly breakup of the band over twenty years ago." As she said at her deposition:

Q: The next paragraph starts with "According to Micki Delp." Do you see that?  
A: I see that.  
Q: It says, "Brad was upset over the lingering bad feelings from the ugly breakup of the band over 20 years ago."  
A: And I didn't say that. So that's someone's assumption, I guess.  
Q: Well, did you say anything similar to that?  
A: No, not a word.  
Q: So you categorically deny that you said any ---  
A: I categorically -  
Q: Please let me finish the question. You categorically deny that you said anything close to what's in that first sentence of that paragraph?  
A: Absolutely, absolutely.

A841-42. For good measure, Ms. Delp added:

Q: Do you believe it to be true, that Brad was upset over lingering bad feelings from the ugly breakup of the band BOSTON 20 years earlier?  
A: No.

A842. See also A343 ("Are you aware that anyone was bitter about band history, any former member? A. No."). Ms. Delp also said that she did not in fact believe that Mr. Delp's professional career was dysfunctional.<sup>15</sup> A332.

The Superior Court judge was obliged to assume (and he said he did assume) that Ms. Delp in fact uttered the words that she later denied that she

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<sup>15</sup>Ms. Delp did not even move for summary judgment on the two statements that she denied making to the Herald; instead, she focused only on the four statements which she acknowledged making. See A1050.

uttered. See A1649 at n. 8. But the court failed to draw the favorable (and inescapable) inference about why Ms. Delp was willing to lie at deposition about what she said; that Ms. Delp knew that what she said to Ms. Fee was false. Knowing falsity can be proved by evidence that the defendant has simply made something up; fabulists necessarily know they are spinning tales. McNamee at 506-507; Flowers v. Carville, 310 F.3d 1118, 1131 (9<sup>th</sup> Cir. 2002). Ms. Delp denied blaming Mr. Scholz at her deposition and in some of her emails because she knew it was false, and that liability would follow from admitting that she said it.

Even if the Court were to stop short of inferring knowing falsity from Ms. Delp's denial that she said those words, Ms. Delp at a minimum lied under oath. The maxim "false in one thing, false in all" has forceful application to the actual malice inquiry. Murphy at 58. When a person has lied under oath - as Ms. Delp must be assumed to have done at her deposition - the jury has no reason to believe her other protestations of subjective good faith.<sup>16</sup> While

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<sup>16</sup>When a source denies making the comment which the newspaper reports, that fact alone suffices for an inference of actual malice as to the reporter, since if one believes the source, then the newspaper necessarily made up the 'facts.' "When the only 'source' of the story did not contain the statements supposedly derived from it, the courts have inferred

disbelief alone is not sufficient, Murphy at 58, "courts have frankly recognized that constitutional malice may be predicated on 'the fact finder's negative assessment of the speaker's credibility at trial.'" David A. Elder et al., Establishing Constitutional Malice for Defamation and False Light Privacy Claims When Hidden Cameras and Deception are Used by the Newsgatherer, 22 Loy. L.A. Ent. L. Rev. 327, 342-43 (2002) (hereafter "Elder"), (internal quotation and citation omitted) (discussing many cases). Massachusetts law is in full accord. See Flesner, 410 Mass. 809 ("much depends on the credibility of the witnesses testifying as to their own states of mind. In these circumstances, the jury should be given to observe the demeanor, during direct and cross-examination, of the witnesses whose states of mind are at issue."). See also McAvoy v. Shufrin, 401 Mass. 593, 599-600 (1988) (reversing j.n.o.v. in libel case where "the jury were able to consider the

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that the defendant recklessly fabricated the story." Zerangue v. TSP Newspapers, Inc., 814 F.2d 1066, 1071 (5<sup>th</sup> Cir. 1987). See also Boyd v. Schwan's Sales Enters., Inc., 23 S.W.2d 261, 265 (Mo. Ct. App. 2000) (evidence of actual malice included source denying any memory of phone call defendant relied upon); Robertson v. McCloskey, 666 F. Supp. 241, 250 (D.D.C. 1987) (direct contradiction by source evidence of actual malice); Cape Publications, Inc. v. Adams, 336 So.2d 1197, 1199-1200 (Fla. App. Ct. 1976) (same). Ms. Delp's self-contradiction would seem to have the same probative force.

defendant's demeanor and judge his credibility" and where "the jury simply did not believe what the defendant had to say"); Murphy at 58, 69 (witness' lack of candor "strongly supports the inference that he deliberately attempted to mislead" which, in turn, supported an inference of actual malice).

The inference that McAvoy and Murphy mandate on summary judgment is strengthened by Ms. Delp's own emails. At times, Ms. Delp insisted that she never said anything bad about Mr. Scholz; at other times, she depicted herself as Mr. Delp's avenger and excoriated Mr. Scholz for a variety of imagined misdeeds. See, e.g., A948 ("Yes, Brad's decision was his own. No one ever said that it wasn't."); A950 ("Show me one accusation . . . show me one post where I accused any one of doing anything?"); A950 ("Did I ever retract what was said? No, because I didn't say it. . . . Tom was never blamed directly or indirectly by me!"). The emails also demonstrate further Ms. Delp's propensity for not stating the truth under oath. Contrast at 343 ("Q. After the [Doug Flutie] tribute concert [at which BOSTON appeared], did you ever tell anyone directly or impliedly that Tom was being demanding or difficult regarding the concert? A. No.") with A938 (claiming that Mr. Scholz "scams the musicians" and pays himself funds from his charitable foundation) and A941-45. See Celle v. Filipino

Reporter Enterprises, Inc., 209 F.3d 163, 190 (2d Cir. 2000) ("lack of current knowledge" of facts reported and "conflicting testimony about the basis for the accusation" sufficed for actual malice).<sup>17</sup>

In short, Ms. Delp's situation seems to be indistinguishable from that of Boston Herald reporter, David Wedge, in the Murphy case insofar as she is now backpedaling on allegations that she originally expressed in decisive terms. See 449 Mass. at 59-63. As there, Ms. Delp's attempts to evade liability by denying that she said what she said could, without more, permit the jury to infer actual malice.

2. The Superior Court disregarded evidence that Ms. Delp herself admitted that she did not know why Mr. Delp killed himself.

The Superior Court also failed to appreciate the probative force of the evidence which demonstrated that Ms. Delp herself agreed that she had no idea why Mr. Delp killed himself, despite blaming Mr. Scholz for it:

Q: Why do you believe that Brad Delp took his own life?

A: I think it was a lot of things. I think it was a combination of a lot of things.

Q: What kind of things?

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<sup>17</sup>Ms. Delp also subsequently denied under oath telling the Herald that she intended to sue them. Contrast A1073 (Affidavit) with A335 ("I suggest you call your legal counsel and straighten that out because that's not what I said.").

A: I can't pinpoint one of several. I was as stunned as everyone else.  
Q: Was a major contributing factor in your opinion his mental health?  
A: No.  
Q: Was a major contributing factor in your opinion his romantic life?  
A: I didn't know much about his romantic life.  
Q: Do you believe that anything Tom Scholz did or said was a major contributing factor?  
A: I have no idea.

A353-54.

"I have no idea" is exactly right. Ms. Delp never filed an affidavit saying where she learned this nonsense, or when Mr. Delp had said that he was so distraught over the breakup of a band which had taken place more than 20 years ago that he intended to kill himself.<sup>18</sup>

Read favorably to Mr. Scholz, there is no basis to conclude that Mr. Delp ever told Ms. Delp what she reported to the Herald - not in suicide notes, not over the phone, not ever. She just made it up ("I have no idea"). Between having in hand suicide notes that did not reference Mr. Scholz and knowing Mr. Delp's psychiatric history, a jury could infer that Ms. Delp knew perfectly well that Mr. Scholz was not

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<sup>18</sup> Indeed, the allegations are so inherently improbable that only a reckless person would put them in circulation. See King at 721. The Limelight interview, Mr. Belair's affidavit (A502), and Ms. Komor's affidavit (A505) all confirmed what common sense suggests: people who hate their job quit their job; they do not light charcoal grills and kill themselves.

why Mr. Delp killed himself and lied to Ms. Fee about it. Under these circumstances, proof of falsity amounts to proof of actual malice because "in fabricating and imagining 'facts' [she] necessarily entertained serious doubts as to the truth of the statement[s]". Carson v. Allied News Co., 529 F.2d 206, 213 (7th Cir. 1976).

Even read favorably to Ms. Delp, she made strong and decisive statements about matters on which her knowledge was, at best, sketchy and incomplete. A353-54. See also A317 ("In the last couple of months before Brad died, did you notice any change in his demeanor or behavior? A. See, I didn't see him."). That is virtually the definition of reckless disregard for the truth. See, e.g., Tosti, 394 Mass. at 491-492. In Tosti, a co-worker alleged that the plaintiff was punching repair tickets without actually repairing the cars. The co-worker, however, was away from the plaintiff's work space at various times and so had incomplete knowledge of what the plaintiff did during his shift. Id. at 492. The court concluded that the evidence was sufficient to show either that the accusations were "based on fabricated observations" or, at the least, that the defendant recklessly made "his accusations based on suspicions and not facts." Id. See also Vanderburg v. Newsweek, Inc., 441 F.2d 378, 380 (5<sup>th</sup> Cir. 1971) (affirming denial of summary

judgment on actual malice where defendant failed to investigate its claims adequately); LeBeau v. Town of Spencer, 167 F. Supp. 2d 449, 456 (D.Mass. 2001) (finding that leveling accusations based on "hearsay and uncorroborated rumors" was evidence of actual malice).

So here. As in Tosti, Ms. Delp knew that she lived thousands of miles away and the only information she had about Mr. Scholz was four months old. Whether Ms. Delp literally invented the charges or whether she made her accusations based on suspicions and not facts, there was sufficient evidence of actual malice to reach the jury.

3. Other evidence, including Ms. Delp's spoliation of evidence, supported an inference of actual malice.

At some point after the litigation began, Ms. Delp failed to preserve the private suicide notes which Mr. Delp left for her even though she was under a court order to do so. See A114. The notes were potentially the most reliable source for information about why Mr. Delp in fact killed himself, and Ms. Delp clearly knew their content before she spoke to the Herald. See A303-04. The note to Ms. Delp, even by her own self-interested recollection, said *nothing whatsoever* about Mr. Scholz or his 'dysfunctional professional life' or the unspeakable 'pressure' that

Mr. Scholz put on Mr. Delp. Id. But the destruction of the note precludes any possibility of examining the original to determine whether or not it contained additional exculpatory information, such as particularized information about why Mr. Delp did kill himself. See Murphy at 61, citing Torgerson v. Journal/Sentinel, Inc., 210 Wisc. 2d 524, 548 (1997) ("destruction of notes is ordinarily sufficient evidence to support a jury verdict of actual malice").<sup>19</sup> The failure to preserve and produce the notes, in combination with the other circumstances discussed previously, was evidence of actual malice.

4. Ms. Delp's overstating her familiarity with the reasons for Mr. Delp's death showed a reckless disregard for the truth.

A related basis on which a jury could infer actual malice is Ms. Delp's vastly overstated familiarity with the 'facts' she purported to report,

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<sup>19</sup> Of course, Murphy and the cases it cited dealt with the destruction of reporter's notes and not suicide notes, but spoliation is a generally recognized principle that applies to any tangible evidence which could be of critical importance to a case. See Murphy at 61. In addition to the destruction of the notes, Ms. Delp also apparently destroyed - or certainly failed to produce - emails which were responsive to request, which were produced by others, and which she was under a court order to retain. See A868-871; A925; A931-940; A989-1012. These emails, some quoted above in part II(B)1 were often quite damaging to Ms. Delp. Like her dishonesty under oath, that circumstance undercuts her protestations of good faith.

and her proclaimed certitude about that which she knew was uncertain. Exaggeration can be as much of a basis for a defamation claim as fabrication, and indeed, "the defamer may be [all] the more successful when he baits the hook with truth." Harte-Hanks, 491 U.S. at 691, n. 37 (internal quotation and citation omitted). See generally Elder at 396-398. She and Mr. Delp lived on separate coasts, and her presence at concerts (when she showed up) was an embarrassment to him. A852. Even assuming (favorably to Ms. Delp) that Mr. Delp did confide some dissatisfaction with Mr. Scholz and BOSTON in their November 2006 phone call, that information stopped well short of what Ms. Delp told the Herald and was four months old. Actual malice may be found where a publisher "falsely overstates a witness' basis for his accusation," Westmoreland v. CBS, Inc., 596 F. Supp. 1170, 1174 (S.D.N.Y. 1984), and it necessarily follows that when the source herself overstates the basis for her accusations that too is evidence of actual malice.<sup>20</sup> Ms. Delp depicting

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<sup>20</sup>By way of analogy, when it is the reporter rather than the source being sued, it is axiomatic that reliance on a known biased source who reports inherently suspect information can be found to have acted with actual malice. See, e.g., Lyons v. New Mass Media, Inc., 390 Mass. 51, 57 (1983) (stating that "recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his report.") (quoting St. Amant v. Thompson, 390 U.S. 727, 732 (1968)). It would be an odd result which impose liability on the reporter for

herself as an insider who was privy to Mr. Delp's innermost thoughts at the time of his death was false, and in the nature of the case was knowingly false. See McNamee, 52 Mass. App. Ct. at 506 (where declarant is in a position to know the truth, proof of falsity amounts to proof of actual malice). The one circumstance that would support an inference that Ms. Delp was privy to Ms. Delp's reasons for killing himself - the suicide note - actually contradicted the story she told insofar as the note never mentioned Mr. Scholz.<sup>21</sup> Thus, that circumstance as well could contribute to an inference of actual malice.

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relying on a known biased source but which permitted the biased source to evade liability based on a supposed absence of actual malice.

<sup>21</sup>Moreover, as noted above, actual malice may be inferred from that which is left out as well as from that which is stated. See, e.g., Suzuki Motor Corp. v. Consumers Union of U.S., Inc., 330 F.3d 1127, 1138-39 (19<sup>th</sup> Cir. 2002), cert. den. 540 U.S. 983 (2003). reversing summary judgment for defendant where evidence existed that libellant shaped facts to fit pre-conceived story angle); Goldwater v. Ginzburg, 414 F.2d 324, 337 (2d Cir. 1969) (use of innuendo and statements taken out of context sufficed to support actual malice where it could be inferred that they were part of a "predetermined result"; Snitowsky v. NBC Subsidiary (WMAQ-TV), Inc., 696 N.E.2d 761, 769-770 (Ill. App. 1998) (finding compelling evidence of actual malice where defendant "deliberately distorted" facts to obtain support for pre-conceived point of view). See generally Elder at 357-58, 381-83.

5. The foregoing circumstances combined with evidence of Ms. Delp's common law malice, was persuasive evidence of knowing falsity or reckless disregard.

The Superior Court acknowledged some of Mr. Scholz' evidence of common law malice (in the sense of spite or ill will). A1654-55. The court was correct that proof of common law malice, *without more*, does not amount to proof of constitutional actual malice. But the court ignored that there was additional evidence as well, and it failed to appreciate the probative force of Ms. Parenteau's affidavit. See A425. Mr. Scholz did not offer generalized evidence of ill will. Ms. Delp made a specific threat, and less than 24 hours later she made good on it. Combined with that evidence, Ms. Delp's naked hatred of Mr. Scholz could properly influence the jury's evaluation of whether actual malice in a constitutional sense was present. See Restatement (Second) of Torts § 580A Comment d (1977) (finding of common law malice may "assist in the drawing of an inference that the publisher knew that his statement was false or acted in reckless disregard of its falsity"); Elder, at 379-80 (discussing cases).<sup>22</sup> See

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<sup>22</sup>For other authorities to the same effect, see (in addition to those cited by Elder) Holbrook v. Casazza, 204 Conn. 336, 349, 528 A.2d 774, 780-781 (1987) (evidence of "the ill will that seemingly spurred the initial publication of her defamatory statement" was evidence of actual malice); Stokes v. CBS, 29 F. Supp.

also Suzuki Motors, 330 F.3d at 1135-38 (reversing summary judgment for defendant; facts tending to show that the defendant's bias led it to a pre-determined outcome which ignored contrary information sufficed for actual malice).

There were many, many roads that could lead a jury to conclude that Ms. Delp acted with actual malice. One such set of inferences was that Ms. Delp knew the truth, but her animosity toward Mr. Scholz led her to use the occasion of Mr. Delp's death to settle old scores. She denied saying the words because she knew that admitting saying the words was effectively to admit liability. She failed to preserve or disclose the suicide notes to herself and her children because she knew they would directly contradict her claims about why Mr. Delp killed himself. She overstated her familiarity with Mr. Delp's state of mind to give heft and plausibility to her story. Indeed, given what she did know about Mr. Delp's life, including his willingness to shortly

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2d 992, 1003 (D.Minn. 1998) ("although actual malice focuses on the defendant's attitude toward the truth of what he has said rather than on his attitude toward the plaintiff, a showing of ill will is nevertheless relevant and admissible as evidence in the determination of whether defendant is at a state of mind highly conducive of reckless disregard to falsity"). If reliance on known biased sources can be enough to show actual malice - and it can, Lyons at 57-58 - it is difficult to see why the biased source should be subject to a more forgiving standard.

embark on another BOSTON tour, her allegations were so inherently improbable that only recklessness or calculated vengeance could explain them. The fact that there was more than one way of looking at the case made summary judgment inappropriate. Taking all the evidence cumulatively, it was up to the jury, not the court, to decide Ms. Delp's state of mind.

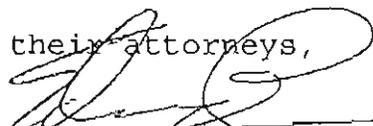
CONCLUSION

For each of the foregoing reasons, this Court should reverse the summary judgment in Ms. Delp's favor and should remand to the Superior Court for further proceedings.

Respectfully submitted,

DONALD THOMAS SCHOLZ and  
THE DTS CHARITABLE  
FOUNDATION, INC.

By their attorneys,



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CERTIFICATE OF COMPLIANCE

I, Edward Foye, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including but not limited to: Mass. R. A. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. A. P. 16(e) (reference to the record); Mass. R. A. P. 16 (f) (reproduction of statutes, rules, regulations); Mass. R. A. P. 16(h) (length of briefs); Mass. R. A. P. 18 (appendix to briefs); and Mass. R. A. P. 20 (form of briefs, appendices, and other papers).



\_\_\_\_\_  
Edward Foye

ADDENDUM

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 10-1010-D

DONALD THOMAS SCHOLZ

vs.

BOSTON HERALD, INC. & others<sup>1</sup>

**MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION  
TO DISMISS**

Plaintiff, Donald Thomas Scholz ("Scholz") has sued the Boston Herald ("Herald") and two of its reporters, Gayle Fee ("Fee") and Laura Raposa ("Raposa") for defamation/libel and intentional infliction of emotional distress. Scholz alleges that Fee and Raposa falsely reported in their Inside Track column that Brad Delp ("Delp") committed suicide because of turmoil in his professional life caused by Scholz. Before this Court is the defendants' Motion to Dismiss for failure to state a claim upon which relief can be granted. After reviewing the parties' submissions and the relevant law, the defendants' Motion to Dismiss is **DENIED** in Part and **ALLOWED** in Part.

**BACKGROUND**

The following background information is taken from Scholz's First Amended Complaint and the exhibits attached thereto.

Scholz is the co-founder and leader of the band BOSTON, which released its first album in August 1976. Barry Goudreau ("Goudreau") resigned from BOSTON in 1981 to record a solo album. Goudreau's solo album featured Delp and Sib Hashian

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<sup>1</sup> Gayle Fee and Laura Raposa

("Hashian"). Hashian resigned from BOSTON in the mid-to-late 1980's. As a result of personality differences, Scholz no longer maintains a relationship with Goudreau and Hashian. Scholz and Delp continued as members of BOSTON with the exception of a four-year period between 1990 and 1994 when Delp took a leave from the band.<sup>2</sup>

Goudreau and Hashian are members of a band, whose publicist is Peggy Rose ("Rose").<sup>3</sup> Rose also represented Delp's family, including Micki Delp (Micki"), Delp's ex-wife. Micki's sister, Connie Goudreau ("Connie"), is married to Goudreau.

On March 9, 2007, Delp committed suicide in his Atkinson, New Hampshire house. Delp was found by his fiancée, Pamela Sullivan ("Sullivan"), lying on the bathroom floor with a suicide note attached to his shirt.<sup>4</sup> The suicide note stated "Mr. Brad Delp. Je suis une ame solitaire [I am a lonely soul]." First Am. Compl. par. 20. Another of Delp's suicide notes stated "I take complete and sole responsibility for my present situation." First Am. Compl. par. 20. Shortly after Delp's death, Rose composed and released a statement on behalf of Delp and Sullivan indicating that Delp died as a result of a heart attack. On March 14, 2007, the Atkinson Police Department indicated that Delp's true cause of death—suicide—would be disclosed to the public the following day. Micki and Sullivan, then issued a second press release without Rose's assistance disclosing that Delp committed suicide.

On March 14, Gail Parenteau ("Parenteau")—who served as Scholz, Delp and BOSTON's publicist for many years—called Rose inquiring about the second press

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<sup>2</sup> Scholz hired Fran Cosmo ("Cosmo") to provide studio vocals during Delp's absence from BOSTON.

<sup>3</sup> In August 2006, Boston Magazine published an article entitled "Gals Gone Wild" in which Rose described the "Inside Track" as a "'favor bank'" and stated that "'[t]hey'll [Fee and Raposa] help you if you're on their good side . . . [i]f not, they can hurt you.'" First Am. Compl. Ex. A, pg. 2. The article further details the close working relationship Rose maintains with Fee and Raposa. First Am. Compl. Ex. A.

<sup>4</sup> Delp left additional suicide notes.

release. This conversation ended with Rose expressing her anger towards Parenteau. At approximately 9:00 p.m. Micki contacted Parenteau and screamed at Parenteau for contacting Rose and engaging in such a heated discussion with Rose. Sometime after talking to Parenteau, Rose "upset over the phone call . . . and thoroughly familiar with Mr. Scholz's former bandmates' animosity towards Mr. Scholz" decided to utilize her close relationship with Fee and Raposa to "initiate a smear campaign against Mr. Scholz." First Am. Compl. par. 24.

On March 15, 2007, the Herald, in its Inside Track column published an article entitled: "Suicide confirmed in Delp's death." First Am. Compl. Ex. B. The article states, in relevant parts:

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 side by continuing to contribute vocals to Scholz' Boston projects while also remaining close to his former bandmates. The situation was complicated by the fact that Delp's ex-wife, Micki, is the sister of Goudreau's wife, Connie.

'Tom made him do the Boston stuff and the other guys were mad that they weren't a part of it,' said another insider. 'He was always under a lot of pressure.'

[ . . . ]

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

Scholz claimed that the other band members-with the exception of Delp-attempted to steal the name Boston. While the bitter battle raged, Delp tried to keep peace with both sides. He continued to perform with Scholz

and the reconstituted Boston but also did projects with Goudreau and remained friends with the other original members.

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

In fact, the wounds remained so raw that Schulz 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.'<sup>5</sup>

On the evening of March 15, 2007, Fee contacted Connie by cellular phone and requested a comment in connection with a story the Herald intended to publish the following morning concerning Delp's suicide notes. Connie refused to comment and ended the conversation. Connie then informed Micki of the phone call she had just received from Fee. Micki called Fee and was interviewed by Fee regarding Delp's suicide notes. Fee tried to coerce Micki into blaming Delp's suicide on "friction Mr. Scholz allegedly caused between some former Boston band members and himself several decades ago." First Am. Compl. par. 33. Micki, however, refused to attribute Delp's suicide to Scholz and gave Fee no indication that she knew why Delp committed suicide.

On March 16, 2007, the Inside Track's headline read: "Pal's snub made Delp do it: Boston rocker's ex-wife speaks; Delp's ex say 'No one can possibly understand.'" First Am. Compl. Ex. C. The article states in relevant parts:

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<sup>5</sup> Scholz alleges that despite referencing various "insiders" throughout the March 15 article Fee and Raposa did not communicate with any sources and in fact invented "insiders" to whom they attribute fictional quotes. Scholz alleges that most of the information contained in the March 15th article was provided to Fee and Raposa by Micki and/or Rose. Scholz further claims Fee and Raposa had reason to doubt the truthfulness of the statements provided to them by Rose and Micki because they were aware of the close connections both women had to former members of BOSTON who disliked Scholz.

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.

[ . . . ]

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.'

[ . . . ]

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.'

Micki understood the March 16 article as blaming Scholz for Delp's death. First Am Compl. pars. 44-47. Micki was furious after reading the March 16, 2007 Inside Track column because she believed at least two of the statements attributed to her in the column were statements she never made. Micki never expressly or implicitly made any statements to Fee consistent with the lead paragraph of the March 16, 2007 Inside Track article in which it was stated that Delp was driven to despair because Cosmo was dropped from the summer tour. Additionally, Micki never expressly or implicitly told Fee that

Delp was “upset over the lingering bad feelings from the ugly breakup of the band Boston over 20 years ago.” First Am. Compl. par. 39.<sup>6</sup> Later that morning, Micki called Fee to inform her that the statements attributed to her in the March 16 article were distortions/fabrications. After her conversation with Micki, Fee discarded her notes from her interview with Micki in a “deliberate effort to conceal” known “inaccuracies in her reporting.” First Am. Compl. par. 46. It is Scholz’s position that the Herald was aware of possible inaccuracies with portions of the March 16 article; however, it permitted if not encouraged Fee to destroy her interview notes. The Herald never retracted any of the statements.

Later that day, Micki called Sullivan to discuss the March 16 article. Sullivan informed Micki that she understood the March 16 article as falsely blaming Scholz for Delp’s death. On March 17, 2007, Sullivan left Scholz a voicemail in which she asked Scholz to contact her about “the pack of lies printed in the Herald.” First Am. Compl. par. 49. On March 23, 2007, Sullivan issued a statement to the press, which the Boston Globe published stating in relevant part:

‘In our grief, we look for answers, for reasons, and perhaps for blame. In the days that have passed since his death there has been a great deal of speculation and rumors put forward by the media and the Boston (band) fan base as to why he chose to end his life.’<sup>7</sup> Words have been taken out of context, statements have been misconstrued, and people have been hurt. People are looking for answers, and there are none to be had. Bradley blamed no one, held no one accountable, for what was in his own heart. His music, his business, his relationships, these were the things that brought him joy. His sadness came from within; it was his own. He wanted no one to carry his burdens in life or death.’

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<sup>6</sup> Scholz alleges that the Herald, Fee and Raposa’s knowing, intentional and/or reckless reporting of these statements, together with their innuendo, created the impression that Micki—someone exceptionally familiar with Delp’s thinking—held Scholz responsible for Delp’s suicide. First Am. Compl. par. 38.

<sup>7</sup> This statement presumably was referring to the Inside Track’s March 15 and 16 articles.

Local, national and international news outlets republished the Inside Track's articles addressing Delp's suicide. First Am. Compl. par. 52. On March 19, 2007, Launch Radio Networks reported:

The ex-wife of BOSTON singer Brad Delp blames long-standing issues within the band for Delp's suicide. Micki Delp told The Boston Herald that Brad was always stuck in the middle of fights between Bandleader Tom Scholz and former members of the group, and that the past 30 years' worth of tensions finally go [sic] the better of him. . . . Micki said the last straw was the recent firing of fellow Boston singer Fran Cosmo and his son, guitarist Anthony Cosmo.

On July 2, 2007, the Inside Track published an article headlined: "Delp tribute on." First Am. Compl. Ex. E. In relevant part, the article states:

Credit music manager and ex-Extreme drummer Paul Geary for bringing all the warring factions together. The Concert will include one number-the encore – during which the original members of the band Boston will reunite. The parties – founder Tom Scholz and original members Barry Goodreau [sic], 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.

Beginning on May 25, 2010 and continuing through May 27, 2010, the Herald published six articles which had the effect of republishing the allegedly defamatory statements attributed to Micki and directed the readers attention back to the 2007 allegedly defamatory articles. The articles printed in the May 25, 2010 Herald were entitled "Dispute in Delp death: Herald asks judge to toss out Boston band member's lawsuit"<sup>8</sup> and "Statements highlight Scholz-Delp relationship."<sup>9</sup> First Am. Compl. Ex. F. On May 26, 2010, the Herald published articles entitled "Scholz's many lawsuits: Court

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<sup>8</sup> This article includes the statement that "in articles published shortly after Delp's 2007 suicide, Fee and Raposa cited several sources as saying the musician felt stuck in the middle of a long-running feud between Scholz and ex-Boston members such as Goudreau." First Am. Compl. Ex. F.

<sup>9</sup> This article states that the Herald believed the Inside Track "stories merely reported that observers thought Delp had been caught in the middle of long-running feuds between Scholz and some of Boston's former members." First Am. Compl. Ex. F.

records show prior defamation cases and . . .” and “. . . Ex-Boston members, Scholz sparred in court.” First Am. Compl. Ex. G. On May 27, 2010, the Herald published two additional articles entitled “Boston’s rocky relations: Court records show tension between Scholz, Delp’s ex-wife”<sup>10</sup> and “What she says she told the newspaper.” First Am. Compl. Ex. H.

## DISCUSSION

### I. Standard of Review

The Supreme Judicial Court recently refined the standard for evaluating the sufficiency of a complaint pursuant to Mass. R. Civ. P. 12(b)(6), holding that, to survive a motion to dismiss, a complaint must set forth the basis of the plaintiff’s entitlement to relief with “more than labels and conclusions.” Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Trombly, 540 U.S. 544, 555 (2007). While factual allegations need not be detailed, they “must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . . .” Id., quoting Bell Atl. Corp., 550 U.S. at 555. At the pleading stage, the complaint must set forth “factual ‘allegations plausibly suggesting (not merely consistent with)’ an entitlement to relief. . . .” Id., quoting Bell Atl. Corp., 550 U.S. at 557.

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<sup>10</sup> This article includes the statement that the Herald’s “pieces merely reported that observers had said that Delp had been caught in the middle of long-running feuds between Scholz and some of Boston’s ex-members.” First Am. Compl. Ex. H.

## II. Defamation/Libel

### A. Inside Track Articles

In support of their motion to dismiss Scholz's libel claim, the defendants contend that (1) the statements contained in the Inside Track articles referring to Scholz are not defamatory; (2) the Inside Track articles do not concern Scholz; (3) the statements in the Inside Track articles are opinions and the reason Delp committed suicide is incapable of being proven; and (4) Scholz cannot prove that the articles were published with actual malice.

In a libel action, the plaintiff must demonstrate that the defendant (1) published a false statement of and concerning the plaintiff to a third party; (2) that the statement was defamatory, in other words, the statement could damage the plaintiff's reputation within the community; (3) that the defendant was at fault for making the statement;<sup>11</sup> and (4) that the statement caused the plaintiff economic loss or is actionable without proof of economic loss. Ravnikar v. Bogojavlensky, 438 Mass. 627, 629-630 (2003); Reilly v. Associated Press, 59 Mass. App. Ct. 764, 769 (2003).

#### 1. Defamatory Connotation

This Court begins with the threshold inquiry into whether the Inside Track articles are "reasonably susceptible of a defamatory connotation," so as to warrant their submission to a jury to determine if in fact the defamatory connotation was conveyed." Jones v. Taibbi, 400 Mass. 786, 791 (1987), quoting Cianci v. New York Times Publ'g Co., 639 F.2d 54, 60 (2d Cir. 1980). "A statement is defamatory in the circumstances if it discredits a person in the minds of any considerable and respectable class of the

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<sup>11</sup> Scholz concedes that he is a public figure. Because Scholz is a public figure he must prove that the defendants made the statements with actual malice. *Supra* section II.A.4.

community.” Howell v. The Enter. Publ’g Co., LLC, 455 Mass. 641, 670 (2010), quoting Milgroom v. News Group Boston, Inc., 412 Mass. 9, 12 (1992). Where statements are “susceptible of both a defamatory and nondefamatory meaning, a question of fact exists for the jury.” Jones, 400 Mass. at 792.

While the Inside Track articles do not explicitly state Delp committed suicide because of Scholz’s behavior, I find that they are reasonably susceptible of a defamatory connotation because the articles insinuate, if not suggest, that Delp’s stressful career, caused in part or in whole by Scholz, played a role in Delp’s suicide.

For instance, the March 15 article uses the phrase “never ending bitterness” to describe Scholz’s relationship with former members of BOSTON and states that Delp was stuck “in the middle” of this conflict. The article further states that “Delp’s constant need to help and please people may have driven him to despair” and quotes another insider as saying ““Tom made him [Delp] do the Boston stuff and the other guys [former BOSTON members] were mad that they weren’t a part of it.”” The article further states that Scholz was not invited to the funeral, and then quotes an insider as saying “[w]hat does that tell you?””

The March 16 article entitled “Pal’s snub made Delp do it: Boston rocker’s ex-wife speaks,” when read with the understanding that Scholz was BOSTON’s leader and therefore had the power to exclude members from BOSTON’s tour implies that Delp committed suicide because Scholz “disinvited” Cosmo from the summer tour. The article also discusses Delp’s mental state, reporting that he was upset “over the lingering bad feelings from” BOSTON’s breakup and that he was stuck in the middle of the “warring factions.” The article also quotes Micki as saying that “Boston to Brad was a job, and he

did what he was told to do. But it got to the point where he just couldn't do it anymore." The July 2 article repeats that Delp committed suicide due to the lingering bad feelings from BOSTON's breakup over twenty years ago. Taken in context with the Inside Track articles of March 15 and 16, one could reasonably understand Scholz to be the source of the longstanding bitterness between BOSTON members

Because the Inside Track's articles are reasonably susceptible to a defamatory interpretation at this motion to dismiss stage of the proceedings, this Court finds sufficient allegations of defamatory articles to rise above the speculative level.

## 2. Statements "Of and Concerning" Scholz

Scholz can establish that the Inside Track articles concerned him by showing either (1) that the defendants intended their "words to refer to [him] and that they were so understood" or that the defendants' "words reasonably could be interpreted to refer to [him] and the [defendants were] 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) (emphasis in original). According to Scholz's complaint, the Herald intended to refer to him throughout the articles as the source of the bitterness between the members of BOSTON. Scholz alleges that Rose was upset over a telephone call she received from Parenteau regarding Delp's death and decided to contact Fee and Raposa to initiate a "smear campaign" against him. First Am. Compl. par. 24. The Inside Track articles published on March 15 and 16 and July 2, 2007, all discuss Scholz's role in BOSTON's breakup, the lingering bad feelings between Scholz and former BOSTON members, and the impact these events had on Delp's emotional state. Delp also alleges in his complaint that Micki and Sullivan understood the

Inside Track articles as blaming Scholz for Delp's death. First Am. Compl. pars. 43-44, 48-50.

Again at this motion to dismiss stage of the proceedings, Scholz has sufficiently pled that FCC, Raposa and the Herald intended the Inside Track articles to refer to him and that individuals who read the articles so understood the articles referred to him. See Eyal v. Helen Broad. Corp., 411 Mass. 426, 431 (1991). Scholz has therefore sufficiently satisfied the "of and concerning" test to survive this Motion to Dismiss.

### 3. Fact or Opinion Nature of Statements

This Court now considers whether the articles are ones of fact, or opinion, or a combination of the two. "The determination whether a statement is a factual assertion or an opinion is a question of law if the statement unambiguously constitutes either fact or opinion." Aldoupolis v. Globe Newspaper Co., 398 Mass. 731, 733 (1986). The Restatement (Second) of Torts § 566 cmt. b, at 172 (1977) provides that opinions "apparently based on facts regarding the plaintiff or his conduct that have not been stated by the defendants or assumed to exist by the parties to the communication" are "mixed" opinions. A "mixed" opinion is actionable "if the comment is reasonably understood as implying the assertion of the existence of undisclosed facts about the plaintiff that must be defamatory in character in order to justify the opinion." Id. cmt. c, at 173.

The test to determine whether a statement is an opinion requires the court to "examine the statement in its totality in the context in which it was uttered or published." Colc v. Westinghouse Broad. Co., Inc., 386 Mass. 303, 309 (1982), quoting Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 784 (9th Cir. 1980). In doing so, "[t]he court must consider all the words used, not merely a particular

phrase or sentence. In addition, the court must give weight to the cautionary terms used by the person publishing the statement. Finally, the court must consider all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published.” *Id.* If the average reader could understand the allegedly libelous statement as either fact or opinion, the determination is for the jury. *Myers v. Boston Magazine Co., Inc.*, 380 Mass. 336, 339-340 (1980).

Even assuming that the articles are an expression of opinion, I find that they are based on undisclosed defamatory facts and therefore are 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. Furthermore, the articles attribute statements to multiple unknown “insiders,” as well as Delp’s ex-wife Micki. An average reader could presume that because the sources cited in the articles were “insiders,” 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.

Viewing the articles in their entirety, it is apparent to me that the opinions expressed in them were based on additional nondisclosed defamatory facts. As recited in the plaintiff’s first amended complaint the articles convey that individuals close to Delp believed that he was under a lot of stress because Scholz “made him do the Boston stuff” and that he was still upset over the manner in which BOSTON disbanded. I find, and thus deny this Motion to Dismiss, because the opinions expressed in the *Inside Track* 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.<sup>12</sup>

#### 4. Fault/Actual Malice

As a public figure, Scholz must prove by clear and convincing evidence that the defendants acted with malice in publishing the articles. Milgroom, 412 Mass. at 10-11, citing New York Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964). One acts with malice by publishing a statement with knowledge that it was false or with reckless disregard of whether it was false or not. Id. at 11. "To have acted with reckless disregard as to the truth of a statement, one must have entertained serious doubts as to the truth of that statement." Id. Although the "serious doubts" test is subjective, it can be shown that a defendant acted with reckless disregard based on inferences drawn from objective evidence. Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 867-868 (1975) ("The jury may, of course, reach this conclusion on the basis of an inference drawn from objective evidence, since it would perhaps be rare for a defendant in such a circumstance to admit to having had serious, unresolved doubts.").

In my view, Scholz's complaint alleges sufficient facts from which a finding could be made that the defendants published the articles either with knowledge that statements in the articles were false or with reckless disregard for whether those statements were false. Scholz alleges that Fee and Raposa relied upon sources they knew were biased against Scholz. Fee and Raposa knew Rose was biased because they were aware of Scholz's turbulent relationship with Rose's clients, former BOSTON members.

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<sup>12</sup> This court is not persuaded by the defendants' contention that what was in Delp's mind when he committed suicide is "unknowable, incapable of being proven one way or the other and, as a matter of well-established law, non actionable." The articles leave the impression, sufficient to defeat a motion to dismiss, that Scholz's behavior played a significant role in Delp's suicide.

Further, Fee and Raposa's reliance on Micki as a source of information was reckless because her sister was married to Goudreau. As a result of these biases, Scholz alleges there was sufficient reason to doubt the accuracy of the information they provided.

Murphy v. Boston Herald, Inc., 449 Mass. 42, 49 (2007), quoting St. Amant v. Thompson, 390 U.S. 727, 732 (1968) ("[R]ecklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his report.").

Next, Scholz alleges that Micki testified in another proceeding that at least two of the statements attributed to her in the March 16 article were either taken out of context or made-up by Fee and Raposa.<sup>13</sup> In deposition testimony, Micki stated that she never told the Inside Track that Delp committed suicide as a result of Cosmo being dropped from BOSTON's summer tour nor did she inform Fee that Delp was upset over lingering bad feelings stemming from BOSTON's breakup. Fee took notes during her March 15, 2007, interview with Micki; however, she discarded her notes after Micki contacted her on March 16, 2007, regarding what Micki perceived as distortions/fabrications in that morning's Inside Track column. See Murphy, 449 Mass. at 61, citing Chang v. Michiana Tel. Corp., 900 F.2d 1085, 1090 (7th Cir. 1990) (reporter's destruction of notes "provides a strong basis for a finding of actual malice").

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<sup>13</sup> The defendants vaguely assert without actually arguing that judicial estoppel precludes Scholz from claiming that Micki did not make these statements, because Scholz alleges in another pending lawsuit that Micki in fact made those comments. Judicial estoppel is an "equitable doctrine that precludes a party from asserting a position in one legal proceeding that is contrary to a position it had asserted in another proceeding." Blanchette v. School Comm. of Westwood, 427 Mass. 176, 184 (1998). Judicial estoppel may be invoked when a party asserts a position in a later proceeding that is "directly inconsistent" to its position in a prior proceeding and "the court has found in favor of that party's position in the prior proceeding." Oris v. Arbella Mut. Ins. Co., 443 Mass. 634, 641 (2005). Judicial estoppel is inapplicable here because Scholz has yet to prevail in the first proceeding (lawsuit against Micki) and because Scholz's position changed because of evidence—Micki's deposition testimony—discovered subsequent to his initiating the first proceeding.

Scholz, therefore, has pled sufficient facts at this motion to dismiss stage to make a claim that the defendants published the articles with actual malice.

B. May 2010 Articles

The defendants contend that the Herald's May 2010 articles<sup>14</sup> do not contain any false statements and therefore cannot be defamatory. Alternatively, the defendants claim that even if the articles contain false statements the articles are protected by the fair report privilege.

On May 26, 2010, the Herald published "Scholz's many lawsuits: Court records show prior defamation cases and . . . ." This article merely summarized Scholz's lawsuit against Micki and Connie, as well as another lawsuit Scholz filed against George Gouldsmith. This article does not contain any false statements. Therefore, I find that this article is not capable of a defamatory connotation. On May 26, 2010, the Herald also published an article entitled ". . . Ex-Boston members, Scholz sparred in court." This article discusses five lawsuits Scholz was a party to involving ex-BOSTON members, two lawsuits involving former managers, as well as one lawsuit involving BOSTON's former record label. This article does not contain any false statements. Therefore, I find that this article is not capable of a defamatory connotation. The Herald's May 27, 2010 article entitled "What she says she told the newspaper" contains excerpts of Micki's deposition testimony in which she describes her reaction to and concerns with the Inside

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<sup>14</sup> On May 25, 2010, the Herald published articles entitled "Dispute in: Delp death: Herald asks judge to toss out Boston band member's lawsuit" and "Statements highlight Scholz-Delp relationship." On May 26, the Herald published two articles entitled "Scholz's many lawsuits: Court records show prior defamation cases and . . ." and ". . . Ex-Boston members, Scholz sparred in court." On May 27, the Herald published articles entitled "Boston's rocky relations: Court records show tension between Scholz, Delp's ex-wife" and "What she says she told the newspaper."

Track's March 16, 2007 article. This article contains no false statements and therefore I find that it is incapable of a defamatory connotation.

The Herald's May 25 and 27, 2010 articles, entitled "Dispute in Delp death: Herald asks judge to toss out Boston band member's lawsuit[,]"" "Statements highlight Scholz-Delp relationship[,]"" and "Boston's rocky relations: Court records show tension between Scholz, Delp's ex-wife", each contain a statement to the effect that the Inside Track articles only reported that sources/observers believed that Delp's was stuck in the middle of Scholz's long running feud with ex-BOSTON members. At the motion to dismiss stage, I find that this statement could be a false statement and therefore is capable of a defamatory meaning. During her conversation with Fee on March 15, 2007, Micki neither expressly nor implicitly alluded to the fact that Delp was upset over BOSTON's breakup and the subsequent bad blood between Scholz and former BOSTON members. First Am. Compl. par. 39.

This Court must next discuss whether some portions of these three articles are protected by the fair report privilege. The fair report privilege allows publishers who "fairly and accurately [report] the subject matter of judicial proceedings" to be immune from liability for claims arising out of those reports. Sibley v. Holyoke Transcript-Tel. Publ'g Co., Inc., 391 Mass. 468, 470 (1984). The rationale supporting the fair report privilege is to "ensure that publications may perform the important function of informing the public of actions taken by the courts." Id. at 472. Simply filing a document with the court does not invoke the privilege; rather the privilege only extends "to matters which really have been made the subject of judicial action." Lundin v. Post Publ'g Co., 217 Mass. 213, 216 (1914). "The privilege is not limited to proceedings before a judge, but

applies in cases in which judicial powers are exercised.” Sibley, 391 Mass. at 471, quoting Thompson v. Boston Publ’g Co., 285 Mass. 344, 347 (1934).

The defendants’ Motion to Dismiss Scholz’s lawsuit was filed with this Court on June 18, 2010. On May 25, 2010, the Herald published “Dispute in Delp death: Herald asks judge to toss out Boston band member’s lawsuit” which discussed the defendants’ attempt to dismiss Scholz’s lawsuit. This article is not protected by the fair report privilege because the defendants’ motion had not yet been filed with this Court. On May 25, 2010, the Herald also published an article entitled “Statements highlight Scholz-Delp relationship” which featured highlighted excerpts from Scholz’s lawsuit. Despite the fact that Scholz’s complaint was on file with this Court, this article is not within the scope of the fair report privilege because this Court had not taken any action with respect to the complaint. Howel v. Enterprise Publ’g Co., LLC, 455 Mass. 641, 655 n.11 (2010) (“Our cases require something more than the mere filing of a defamatory complaint by a private citizen with a governmental body to qualify a report thereon for the protection of the privilege.”).

On May 27, 2010, the Herald published an article entitled “Boston’s rocky relations: Court records show tension between Scholz, Delp’s ex-wife” which contained excerpts of Micki’s deposition testimony from Scholz’s lawsuit against her. The excerpts focused on Scholz not being invited to Delp’s funeral as well as a conversation Micki had with Scholz’s ex-wife at the funeral. While Micki’s deposition testimony had been filed with the court in that lawsuit (Scholz’s lawsuit against Micki), it had not yet been filed in conjunction with this lawsuit. Therefore, these excerpts were not part of the public record and are not within the scope of the fair report privilege.

### III. Intentional Infliction of Emotional Distress

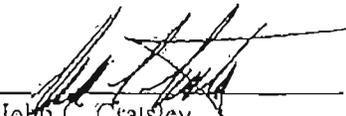
With respect to Scholz's intentional infliction of emotional distress claim, the defendants argue it must be dismissed because Scholz fails to demonstrate the requisite "extreme and outrageous" conduct.

To establish his intentional infliction of emotional distress claim, Scholz must show: "(1) that the defendant[s] intended to inflict emotional distress, or knew or should have known that emotional distress was the likely result of [their] conduct, but also (2) that the defendant[s'] conduct was extreme and outrageous, beyond all bounds of decency and utterly intolerable in a civilized community, (3) the actions of the defendant[s] were the cause of the plaintiff's distress, and (4) the emotional distress suffered by plaintiff was severe and of such a nature that no reasonable person could be expected to endure it." Payton v. Abbott Labs, 386 Mass. 540, 555 (1982).

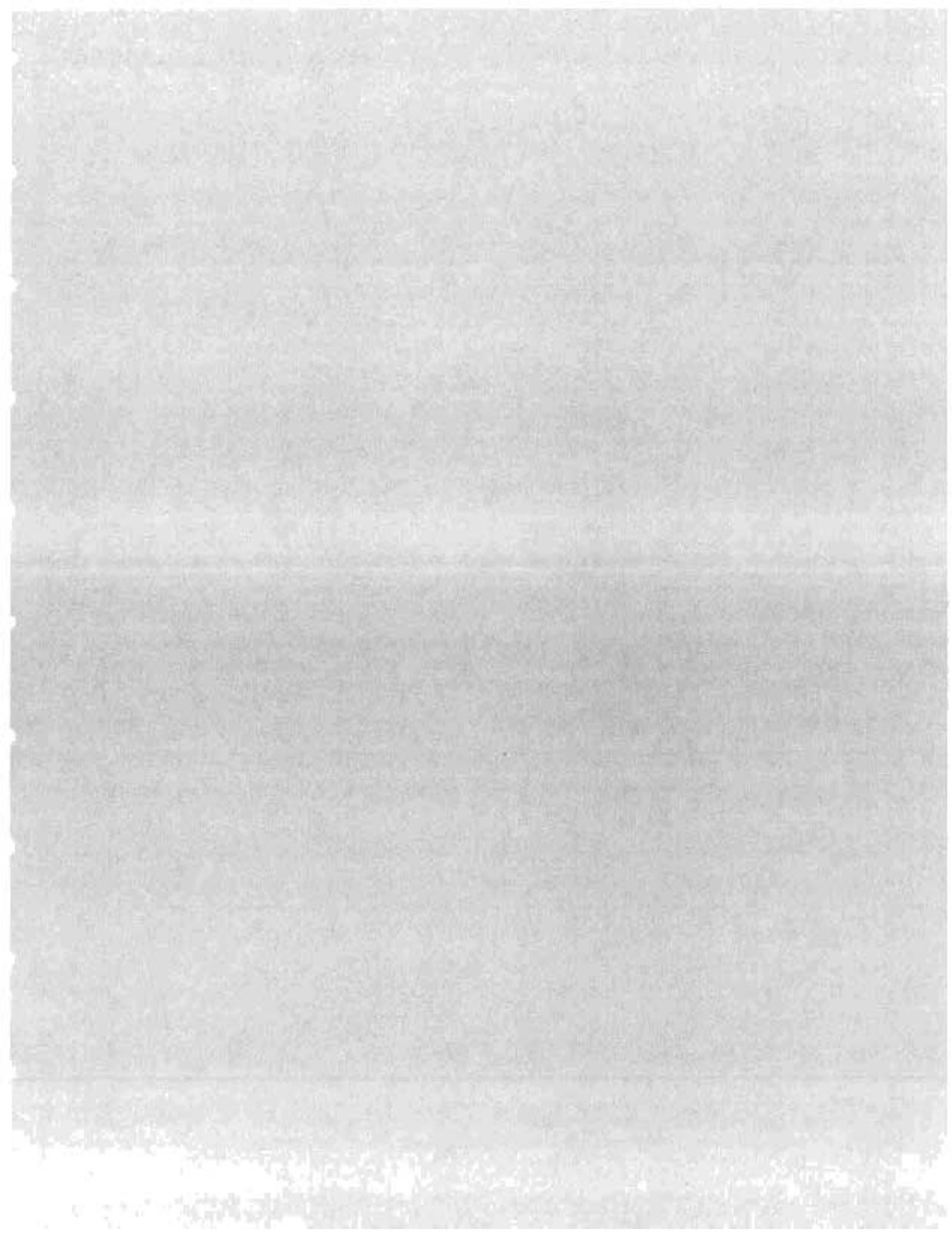
The complaint alleges that Fee and Raposa wrote these articles as part of Rose's "smear campaign" against Scholz. By talking to and quoting various people with "knowledge" of the situation, the articles create the impression that Delp's suicide was the result of professional and/or personal pressure caused by Scholz. This Court finds that Scholz's complaint and the inferences, not speculation, from its contents support his claim that the defendants' alleged conduct is "extreme and outrageous." Therefore the defendants' Motion to Dismiss this count is denied.

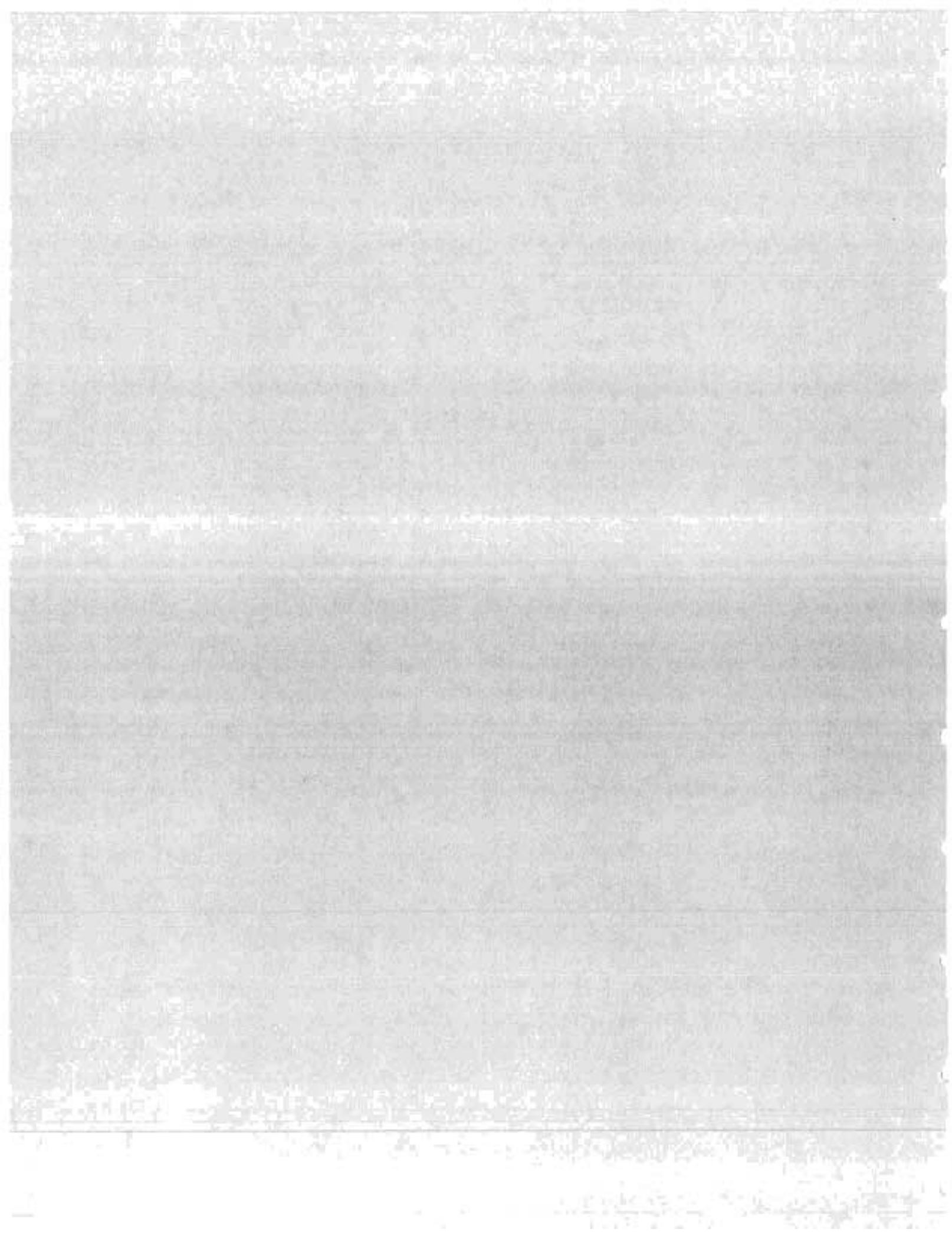
ORDER

For the above-mentioned reasons, it is hereby ORDERED that the Boston Herald, Inc., Gayle Fee and Laura Raposa's Motion to Dismiss is DENIED in Part and ALLOWED in Part. The defendants' Motion to Dismiss is ALLOWED to the extent Scholz's defamation claim relies upon the following Boston Herald articles: "Scholz's many lawsuits: Court Records show prior defamation cases and . . ." dated May 26, 2010; ". . . Ex-Boston members, Scholz sparred in court" dated May 26, 2010; and "What she says she told the newspaper" dated May 27, 2010.

  
John C. Cratsley  
Justice of the Superior Court

DATED: September 10, 2010





COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 2010-4069<sup>1</sup>  
(consolidated with 2010-1010)<sup>2</sup>

DONALD THOMAS SCHOLZ & another<sup>3</sup>

vs.

MICKI DELP & others<sup>4</sup>

MEMORANDUM OF ORDER AND DECISION ON MICKI DELP'S  
SUPPLEMENTAL MOTION FOR SUMMARY JUDGMENT

*ul. ruled*  
*8-19-11*  
*PAT*  
*SES*  
*SJR*  
*gdr*  
*gm*

These consolidated actions arise from articles published by the Boston Herald regarding the suicide of Brad Delp ("Brad"), the former lead singer of the band BOSTON. In the action that is the subject of this decision, Suffolk Civil Action No. 2010-4069, the plaintiff, Donald Thomas Scholz ("Scholz"), the founder of BOSTON, brought a claim for defamation against the defendant, Micki Delp ("Micki"), Brad's ex-wife, with respect to statements in one Boston Herald article that are attributed to Micki (Count I).<sup>5</sup> The plaintiffs claim that these statements

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<sup>1</sup> The case was originally filed in Middlesex Superior Court as Civil Action No. 2007-3944.

<sup>2</sup> Scholz v. Boston Herald, Inc., Gayle Fee, and Laura Raposa.

<sup>3</sup> The DTS Charitable Foundation, Inc.

<sup>4</sup> Connie Goudreau and Jane Doe.

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

indicate that Brad committed suicide because of turmoil in his professional life caused by Scholz. Now before this Court is Micki's Supplemental Motion for Summary Judgment. For the reasons discussed below, the motion is ALLOWED.

#### FACTUAL BACKGROUND

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

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

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

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

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

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

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

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

Police said Delp sealed himself inside his bathroom last Friday, lit two charcoal grills and

committed suicide via carbon monoxide poisoning.

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

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

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

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

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

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

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

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

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

#### **PROCEDURAL BACKGROUND**

On April 23, 2010, Micki filed a Motion for Summary Judgment (Docket #43). On September 21, 2010, Micki filed a Motion for Dismissal of Plaintiff's Complaint as a Sanction for his Willful Withholding and Whiting-Out of Highly Material Discovery that Establishes her Right to Summary Judgment (Docket #50). Micki also filed a Motion for Leave to File

Supplemental Summary Judgment Papers, “[i]n the event that the Court does not dismiss Scholz’ complaint in its entirety” (Docket #53). On September 28, 2010, the parties filed a stipulation stating that Micki could file supplemental materials regarding her Motion for Summary Judgment and Scholz would have an opportunity to respond (Docket #51). Thereafter, Micki filed a Supplemental Motion for Summary Judgment and Scholz responded.

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

On May 13, 2011, Scholz indicated that he had obtained “significant evidence that establishes, without any doubt, the true reason why Brad Delp committed suicide.” On May 16, 2011, Scholz requested the court defer ruling on Micki’s Motion for Summary Judgment until Scholz could take the deposition of two “third-party witnesses” concerning the “significant evidence.” The court allowed the motion and held a hearing on June 6, 2011 regarding whether it would consider additional evidence from the “third-party witnesses.” The parties filed memoranda regarding whether the court should consider the new testimony (Docket #s 192 and 195).

## DISCUSSION

Summary judgment shall be granted when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); Cassesso v. Commissioner of Correction, 390 Mass. 419, 422 (1983); Community Nat'l Bank v. Dawes, 369 Mass. 550 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue. Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989). The moving party may satisfy this burden either by submitting affirmative evidence that negates an essential element of the opposing party's case or by demonstrating that the opposing party has no reasonable expectation of proving an essential element of its case at trial. Flesner v. Technical Communications Corp., 410 Mass. 805, 809 (1991); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond with evidence of specific facts establishing the existence of a genuine dispute. Pederson, 404 Mass. at 17. When reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party, drawing all permissible inferences in his or her favor. Douillard v. LMR, Inc., 433 Mass. 162, 163 (2001).

To withstand a motion for summary judgment for defamation, Scholz must demonstrate that (1) Micki made a false statement "of and concerning" Scholz to a third party; (2) the statement could damage Scholz' reputation in the community; (3) Micki was at fault for making the statement;<sup>6</sup> and (4) the statement caused Scholz economic loss or is actionable without proof

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<sup>6</sup> The level of fault varies between negligence for statements concerning private persons and actual malice for statements concerning public figures. Jones v. Taibbi, 400 Mass. 786, 797 (1987).

of economic loss.<sup>7</sup> Ravnikar v. Bogojavlensky, 438 Mass. 627, 629-630 (2003); Reilly v. Associated Press, 59 Mass. App. Ct. 764, 769 (2003).

Micki made the following statements to the Boston Herald:

- (1) Shortly before his death, Brad was “upset” about his friend and bandmate, Fran Cosmo, being “disinvited” from BOSTON’s tour;
- (2) “Barry and Sib are family and the things that were said against them hurt” and “Boston to Brad was a job, and he did what he was told to do. But it got to the point where he just couldn’t do it anymore”;
- (3) “No one can possibly understand the pressure [Brad] was under”;
- (4) “Brad lived his life to please everyone else. He would go out of his way and hurt himself before he would hurt somebody else, and he was in such a predicament professionally that no matter what he did, a friend of his would be hurt. Rather than hurt anyone else, he would hurt himself. That’s just the kind of guy he was.”
- (5) Brad was driven to despair after his longtime friend Fran Cosmo was dropped from a summer tour, the last straw in a dysfunctional professional life that ultimately led to the sensitive frontman’s suicide; and
- (6) Brad was upset over the lingering bad feelings from the ugly breakup of the band Boston over 20 years ago.<sup>8</sup>

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

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<sup>7</sup> There are four types of statements that are actionable without proof of economic loss: (1) statements that constitute libel; (2) statements that charge the plaintiff with a crime; (3) statements that allege that the plaintiff has certain diseases; and (4) statements that may prejudice the plaintiff’s profession or business. Ravnikar v. Bogojavlensky, 438 Mass. 627, 630 (2003).

<sup>8</sup> Micki denies that she made the last two statements. For purposes of this summary judgment motion, however, the court, considering the facts in the light most favorable to Scholz as the non-moving party, assumes that Micki made the statements.

#### A: Defamatory Connotation

The first question this Court addresses is whether the statements are reasonably susceptible of a defamatory meaning. Foley v. Lowell Sun Publishing Co., 404 Mass. 9, 11 (1989); Ellis v. Safety Ins. Co., 41 Mass. App. Ct. 630, 635 (1996). If the answer to this question is “yes,” then the ultimate issue of whether the article is defamatory is not for the court. Phelan v. May Dep’t Stores Co., 443 Mass. 52, 56-57 (2004); see Jones v. Taibbi, 400 Mass. 786, 791-792 (1987) (“Where the communication is susceptible of both a defamatory and nondefamatory meaning, a question of fact exists for the jury.”). If the answer is “no,” however, the defamation claim should be dismissed. Stanton v. Metro Corp., 438 F.3d 119, 125 (1st Cir. 2006).

The test to determine whether a writing is susceptible to defamatory meaning asks “whether, in the circumstances, the writing discredits the plaintiff in the minds of any considerable and respectable class of the community.” Brauer v. Globe Newspaper Co., 351 Mass. 53, 55 (1966) (internal quotations omitted); see Phelan, 443 Mass. at 56, quoting Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 853 (1975) (“A false statement that ‘would tend to hold the plaintiff up to scorn, hatred, ridicule or contempt, in the minds of any considerable and respectable segment in the community,’ would be considered defamatory.”); King v. Globe Newspaper Co., 400 Mass. 705, 718 (1987) (inferences which might be drawn from a statement can make it actionable); Restatement (Second) of Torts § 568 (1977). The court must interpret the statement reasonably and examine it “in its totality in the context in which it was uttered or published.” Foley, 404 Mass. at 11.

I find that none of the statements of Micki Delp are reasonably susceptible of a defamatory meaning. While the article as a whole could be read by some to contain a defamatory

meaning as to Scholz because of the possible leap or inference a reader might make that turmoil in Brad's professional life, possibly caused by Scholz, played a role in Brad's suicide, none of the statements attributed to Micki make that connection, either explicitly or implicitly. While Micki's statements speak to Brad's "dysfunctional professional life," including the exclusion of Fran Cosmo and the "ugly breakup of" BOSTON, it is the Boston Herald writers who create the connection to Scholz and the possible implication that Scholz was responsible for the "dysfunction" and thus, Brad's suicide. See Eyal v. Helen Bdcst. Corp., 411 Mass. 426, 433-434 (1991) (even though reports in other media sources may have focused on the corporation, "the broader and more intensive commentary done by others on the story cannot serve to make the [defendants'] statement capable of a defamatory meaning if the defendants' words themselves have no application to the corporation"). For example, the Herald article quotes Micki as saying that Brad was upset that Fran Cosmo had been disinvited from the tour and then quotes Scholz who denied any unhappiness on Brad's part because of the exclusion of Fran Cosmo. The Herald writers immediately follow Scholz' quote with "[n]onetheless," suggesting a possible connection between Scholz and Brad's suicide. And later in the Herald article, the writers state that Micki said that Brad was upset over the lingering bad feelings from the ugly breakup of BOSTON. The Herald writers, strictly on their own, explain that Brad continued to work with Scholz, but also worked with Barry Goodreau, Fran Sheehan, and Sib Hashian who had a fierce falling out with Scholz in the early '80s. Then the Herald writers add, again possibly seeking to create a connection between Scholz and Brad's suicide, "[a]s a result, [Brad] was constantly caught in the middle of the warring factions."

Thus, even assuming that the Boston Herald article actually discredited Scholz in the

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

While finding that Micki’s statements as reported are not reasonably susceptible of a defamatory meaning as to Scholz is sufficient to grant summary judgment for Micki, see Stanton, 438 F.3d at 125, this Court will address some of the other reasons why Scholz cannot survive summary judgment.

#### **B. “Of and Concerning”**

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

Just as all six of Micki’s statements do not have defamatory content as to Scholz, I find that none of the statements are “of and concerning” Scholz. The statements of Micki do not refer

to Scholz by name “or in such a manner as to be readily identifiable . . . .” New England Tractor-Training of Conn. Inc., 395 Mass. at 480. Compare Driscoll v. Board of Trustees, 70 Mass. App. Ct. 285, 298 (2007) (statement was not “of and concerning” as plaintiff was not mentioned by name in article) with Rielly, 59 Mass. App. Ct. at 777 (statement was “of and concerning” plaintiff who was “only person identified in article”). As previously discussed, Micki’s six statements are about Brad and his mental state at the time of his suicide. The Herald writers, for whatever reason, added Scholz’ name and his quotes. So if there is any possibility that the article is “of and concerning” Scholz, it is the Herald writers’ doing.

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

### **C. Actual Malice**

Scholz concedes that he is a limited purpose public figure; thus, Scholz must show, by clear and convincing evidence, that Micki acted with actual malice, that is, that Micki made each statement with knowledge of its falsehood or with reckless disregard for whether it was false. See New York Times v. Sullivan, 376 U.S. 254, 279-280 (1964). To establish reckless disregard, the plaintiff must show “‘that the defendant in fact entertained serious doubts as to the truth of his publication,’ but proceeded to publish anyway.” Lane v. MPG Newspapers, 438 Mass. 476,

485 (2003), quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968); see Stone, 367 Mass. at 868 (standard is subjective so such doubts have to be in fact entertained by defendant although finding can be drawn from inference based on objective evidence).

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

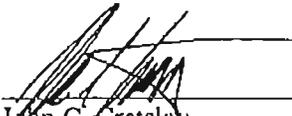
Statement 5 is the only statement which Micki could possibly have made falsely or with reckless disregard of the truth. It is the only statement containing causal language (“... the last straw ... that ultimately led to ... suicide”). Scholz has not submitted sufficient evidence at this stage, however, indicating that she actually did speak falsely or with reckless disregard for the truth. All of the evidence submitted by Scholz on this issue goes toward establishing Micki's alleged hatred or dislike of Scholz. “In the context of defamation, [however,] the term ‘actual malice’ does not mean the defendant’s dislike of, hatred of, or ill will toward, the plaintiff.”

Rotkiewicz v. Sadowsky, 431 Mass. 748, 752 (2000); see Restatement (Second) of Torts § 580A comment d (“The presence of ill will or animus has no more effect than to assist in the drawing of an inference that the publisher knew that his statement was false or acted in reckless disregard of its falsity.”). The absence of anything in the summary judgment record indicating that Micki actually lied or doubted the truth of statement 5 is telling. See id. at 755 (2000) (inquiry is subjective one as to defendant’s attitude toward truth or falsity of statement rather than defendant’s attitude toward plaintiff). Gail Parenteau’s affidavit about her conversations with Micki on March 14 and 15, 2007, while describing Micki’s anger and hostility toward Scholz,

including her wish to link Brad's suicide to his unhappiness with Scholz, does not reveal anything about the truthfulness of statement 5 to the Herald. Whether she spoke falsely to the Herald on March 15, 2007, in an intentional effort to blame Delp's suicide on Scholz remains pure speculation. Furthermore, for reasons already given, Scholz has not overcome his burden of showing that statement 5 was reasonably susceptible of a defamatory meaning or of and concerning Scholz.<sup>9</sup>

**ORDER**

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

  
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John C. Cratsley  
Justice of the Superior Court

Date: August 19, 2011

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