

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

FAR No. 26404
(Appeals Court No. 2017-P-161)

JON BUTCHER,

Plaintiff-Appellant,

v.

UNIVERSITY OF MASSACHUSETTS, *et al.*,

Defendants-Appellees.

**APPELLEE CADY VISHNIAC'S APPLICATION FOR
FURTHER APPELLATE REVIEW**

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REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Defendant-Appellee Cady Vishniac respectfully requests further appellate review in this case pursuant to Mass. R. App. P. 27.1, limited to the issues described herein. The Appeals Court's decision narrowly construing the "fair report privilege" in defamation law opens up the possibility that claims for defamation and intentional infliction of emotional distress could lie for the commonplace practice of publishing material contained in a police blotter – material that police are statutorily required to maintain and that is defined as a public record, *see* G.L. c. 41, § 98F – and publishing material released by police to the media. The issues that this case presents are of substantial public importance and warrant further appellate review.

STATEMENT OF PRIOR PROCEEDINGS

Plaintiff-appellant Jon Butcher filed a six-count complaint in Suffolk Superior Court against the University of Massachusetts and several present and former employees,¹ including Vishniac, a former UMass-Boston student and the news editor of the UMass-Boston student newspaper known as "Mass Media" at the relevant time,² on January 21, 2014. He alleged, *inter alia*, "defamation/libel" (Count I) and "emotional distress" (Count VI).³ SA-I-11-19.⁴ The

¹ The present and former employees are Keith Motley, chancellor of UMass; Winston Langley, provost of UMass; Patrick Day, vice chancellor of UMass; James Overton, director of public safety for the UMass Boston Police Department; Donald Baynard, captain of the UMass Boston Police; Paul Parlon, detective of the UMass Boston Police; Shira Kaminsky, editor in chief of Mass Media (UMass Boston's independent student newspaper); Paul Driskill, managing editor of Mass Media; Cady Vishniac, former news editor of Mass Media; and Brian Forbes, manager of systems and networking at UMass Boston.

² The University's Office of the General Counsel is representing Vishniac in this matter pursuant to G.L. c. 258, §§ 2, 6, and 9, and in accordance with the University's Board of Trustees Policy Doc. T95-023.

³ The other counts were styled "Declaratory Judgment," "Direction under false pretenses," "Illegal seizure without probable cause," and "Workplace retaliation." SA-I-16-17.

⁴ Citations to "SA-x-yy-zz" are to the Supplemental Appendix filed in the Appeals Court, volume x, pages yy-zz. Citations to "Add." are to the Addendum appended to this application.

Superior Court (MacLeod, J.) allowed Appellees' motion to dismiss as to all counts and all defendants except Count I as against Vishniac, and Count VI, which the court took to be a claim for intentional infliction of emotional distress, as against all defendants. *See* SA-I-165-80.

Following discovery, Appellees moved for summary judgment on all counts. The Superior Court (Wilkins, J.) allowed the motion as to all counts against all defendants on November 21, 2016. SA-III-44-58. Butcher filed a timely notice of appeal on December 7, 2016.

In a published opinion dated September 17, 2018, the Appeals Court reversed the award of summary judgment to Vishniac on Counts I and VI; it affirmed the dismissals as to all other counts and all other defendants. Add. 38 (slip op. 18). Vishniac sought and received from this Court an extension of time in which to file this application to and including November 8, 2018. Dkt. #1, No. FAR-26404.

STATEMENT OF FACTS

On March 13, 2013, Butcher was involved in a confrontation with the driver of a UMass-Boston shuttle bus at the JFK-UMass MBTA station. SA-I-221. After the confrontation, the driver reported the incident to UMass-Boston police, telling them that he believed the man he had confronted (the driver did not know Butcher's identity) had been taking photographs of female members of the university community without their knowledge or consent. SA-I-221-22. The driver had taken photographs of the man he confronted, and he gave those photographs to the police. SA-III-25, 29.

The police, as required by G.L. c. 41, § 98F, included this incident in their "daily log," also commonly referred to as a "blotter." SA-I-226. The UMass-Boston student newspaper,

Mass Media, published the contents of the blotter with respect to the incident.⁵ The blotter entry read, in full:

A suspicious white male in a black jacket took photographs and video of nearby women, as well as some buildings on campus. A witness stated that the party did not appear to be a student and was not wearing a backpack. The witness snapped a photograph of the suspect and shared that photograph with Campus Safety. Officers tried to locate the suspect at JFK/UMass Station, but could not find him.

SA-III-38.

The UMass-Boston police investigated this incident thoroughly. In initial communications via email, Butcher used a pseudonym, “Eric Jones,” which caused a delay in the police being able to identify him. *See* SA-III-27-28. After Butcher admitted in an interview with UMass-Boston Police Detective Parlon that he had failed to reply to an email that asked “Eric Jones” to contact him directly, the detective explained to Butcher “that due to his lack of response the department released a photograph, as is commonplace in policing to identify individuals.” SA-III-28. Detective Parlon further explained that Butcher’s “image was put in the Mass Media News Paper for assistance in his identification.” SA-III-27. Detective Parlon “explained that police do this to often identify the innocent as well as people who may be suspected of wrong doing.” SA-III-28.⁶

⁵ A document entitled “Crime Awareness and Campus Security Information Report” that is posted on UMass-Boston’s website states that “[w]eekly a ‘Police Blotter’ is provided to the student newspaper, listing all crimes reported for the prior week.” https://www.umb.edu/editor_uploads/images/safety/cleryact.pdf, at 4.

⁶ The source of the photographs of Butcher in Mass Media, the UMass-Boston student newspaper, is thus not in dispute. As described in the text, and as the blotter entry itself states, the bus driver had taken photographs of Butcher in the course of the confrontation, and he gave those photographs to the UMass-Boston police; the police later released them in an effort to identify Butcher. The record shows that the police obtained the photographs directly from the bus driver who confronted Butcher. *See, e.g.*, SA-III-25 (officer reporting that the bus driver “sent me the picture he took of [the suspicious person]”); SA-III-29 (different officer reporting that an employee of the bus company “provided me with photos of the subject that was taking pictures at JFK [station] and on the Crystal bus”). To the extent that the Appeals Court’s opinion could be read to suggest that the student newspaper obtained the photographs *directly* from the

Mass Media posted the photographs released by the police on its website (and later published them in print) as part of a brief story bearing the headline “Have You Seen This Man?” *See* SA-I-33, 260. The story reflected the information obtained from the police blotter (with some minor inaccuracies that both the Superior Court and the Appeals Court determined are not material, as further discussed in the Argument, *infra* p. 11, n.8), and requested the public’s assistance in identifying the man in the photographs. The story read, in full:

On the morning of March 13, the man in the photograph allegedly walked around the UMass Boston campus snapping pictures of female members of the university community without their permission. According to the student who reported him, he did not appear to be a student as he was not carrying a backpack. If you see him, please call Campus Safety at 617-287-7780.

SA-I-33 (website), SA-I-260 (print).

Butcher was never arrested, and no charges were ever filed against him. Butcher later filed suit, as described above.

bus company, *see* Add. 24 (slip op. at 4) (“[T]he newspaper published an article on its Web site, accompanied by a photograph of Butcher provided by the shuttle bus company....”), it is incorrect. There is no evidence in the record tending to suggest that anyone from the bus company ever sent photographs directly to the student newspaper, and neither Butcher nor anyone else has ever claimed that that was the case.

**POINTS WITH RESPECT TO WHICH
FURTHER APPELLATE REVIEW IS SOUGHT⁷**

1. Whether the publication of information gained from a police blotter, and released by police in the course of their investigation, falls within the “fair report privilege.”
2. Whether the publication of information gained from a police blotter, and released by the police in the course of their investigation, can constitute intentional infliction of emotional distress.

⁷ As the Appeals Court correctly noted, “Butcher raise[d] no argument on appeal regarding the dismissal of the other counts [besides Count I for defamation and Count VI for intentional infliction of emotional distress].... Accordingly all such arguments are waived.” Add. 27 (slip op. at 7 n.4). Further, neither the dismissal of Counts II-V against all defendants nor the dismissal of Counts I and VI against defendants other than Vishniac presents any issue of substantial importance or otherwise satisfying the standards set forth in Mass. R. App. P. 27.1(a). Accordingly, Vishniac respectfully submits that further appellate review should be allowed limited to the points described herein. *See, e.g., Commonwealth v. Lombard*, 419 Mass. 585, 593 (1995).

STATEMENT OF REASONS WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

As stated in the Massachusetts Declaration of Rights, “[t]he liberty of the press is essential to the security of freedom in a state; it ought not, therefore, to be restrained in this commonwealth.” Mass. Const. Pt. 1, Art. XVI (as amended by Amend. Art. LXXVII); *see also*, *e.g.*, U.S. Const. Amend. 1. This Court has long recognized that a “fair report” privilege in defamation cases is essential to protecting the press from being improperly “restrained.” By allowing claims for defamation and intentional infliction of emotional distress to go forward based on a student newspaper editor’s simply publishing information from a police blotter, and publishing photographs that the police themselves had released to identify a person of interest in an active investigation, the Appeals Court misapplied existing precedent in this area and has opened up the possibility of widespread tort liability among media entities that publish information obtained from law enforcement. This Court’s further review is therefore warranted.

I. The Appeals Court’s Decision On The Fair Report Privilege Is Wrong, Threatens The Press’s Ability To Report On Important Matters Affecting Public Safety, And Places Massachusetts Out Of Step With Other Jurisdictions

This Court has recognized the fair report privilege in defamation cases for well over a century. *See, e.g., Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884) (Holmes, J.). In this Court’s most recent extended discussion on the topic, it described the privilege as “a safety valve to the common-law rule that a republisher of a defamatory statement was subject to the same liability as the original defamer.” *Howell v. Enterprise Pub. Co., LLC*, 455 Mass. 641, 650 (2010) (citing *Medico v. Time, Inc.*, 643 F.2d 134, 137 (3d Cir. 1981)). Courts have long recognized that “the republication rule placed newspapers in difficult straits: even if the original statement was newsworthy because it was defamatory, the newspaper risked liability unless it could prove the

truth of the defamation, often impossible by definition.” *Id.* at 651. Therefore, “[t]he fair report privilege establishes a safe harbor for those who report on statements and actions so long as the statements or actions are official and so long as the report about them is fair and accurate.” *Id.* (citing *Medico*, 643 F.2d at 137-38). This Court, like many others, has looked to the Restatement (Second) of Torts § 611 (1977) (the “Restatement”), and commentary thereto, as a guide to the contours of this privilege. *See, e.g., Howell*, 455 Mass. at 652.

As this Court and others have recognized, constitutional values as well as practical considerations are at stake with the fair report privilege. “Although [this Court] ha[s] not had occasion to determine if the fair report privilege is compelled by the United States Constitution or the Massachusetts Constitution, there is little doubt that the privilege insulates a category of speech that tends to receive the utmost deference from both.” *Id.* at 654 n.10; *see also, e.g., Trainor v. The Standard Times*, 924 A.2d 766, 770 n.4 (R.I. 2007) (“[W]e note that recognition of the fair report privilege may quite possibly be constitutionally required in light of the courts’ continually evolving understanding of the implications of the First Amendment.”); *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1299 (D.C. Cir. 1988) (“Federal constitutional concerns are implicated ... when common law liability is asserted against a defendant for an accurate account of judicial proceedings.”); *Medico*, 643 F.2d at 143 (“Although the Supreme Court has never explicitly recognized a constitutional privilege of fair report, several of its recent decisions point toward that result.”); Restatement § 611, cmt. b (“If the report of a public official proceeding is accurate or a fair abridgment, an action cannot constitutionally be maintained ... for defamation”).

The question in this case is whether Mass Media’s republication of information gained from the UMass-Boston police blotter, and directly from the police in the course of an

investigation, was a report of information that was sufficiently “official” to fall within the fair report privilege. This Court has never confronted this exact issue. The broad impact of the Appeals Court’s erroneous decision, and the importance to the press of using information obtained from law enforcement, counsel strongly in favor of doing so now.

A. The Appeals Court misapplied precedent from this Court and the Appeals Court in concluding that the fair report privilege does not apply to this case

This Court has “conclude[d] that unofficial statements made by police sources are outside the scope of the fair report privilege.” *Jones v. Taibbi*, 400 Mass. 786, 796 (1987). But *Jones* also made clear that, “[s]hould it be demonstrated that [a witness’s] allegations were made public as part of an *official* statement by [police], the defendants would be privileged to report that statement.” *Id.* at 797 (emphasis added). *Jones* did not explain exactly what sort of police “statement” would be sufficiently “official” to justify conferring the privilege, other than to hold that a police chief’s repetition of the allegations at a press conference “is insufficient to establish that those allegations were privileged.” *Id.* at 802. As this Court later explained, “the *Jones* case stands for the principle that mere allegations made to public officials cannot support the privilege; *something* must imbue the allegations with an official character.” *Howell*, 455 Mass. at 658 n.14 (emphasis added).

In a 2003 case, the Appeals Court applied *Jones* in declining to apply the privilege “to witness statements to police, whether appearing in an official police report or not, *where no official police action is taken*.” *Reilly v. Assoc. Press*, 59 Mass. App. Ct. 764, 776-77 (2003) (Cypher, J.) (citing *Jones*; emphasis added). In that case, where there was “*no police investigation or action* following up on [the witness’s] statements in the police report,” the court deemed the statements “unverified hearsay” and therefore not privileged. *Id.* (emphasis added).

This case law indicates that the fair report privilege should apply to this case, as the Superior Court correctly found. *See* SA-III-51-53. The release of the information in the blotter was unquestionably part of official police duties: it is mandatory under G.L. c. 41, § 98F, which requires every police department in Massachusetts to maintain a log of “all responses to valid complaints received [and] crimes reported” – and which further provides that these logs “shall be public records.” Having determined that the bus driver’s report was a “valid complaint,” the police properly included the incident he reported in their official log, and Mass Media was therefore privileged to report it. Similarly, the record demonstrates that the police investigated the incident, and that in the course of doing so they released photographs of Butcher as part of their effort to identify him. Investigating reports of suspicious activity is part of a law enforcement officer’s official duties. *See, e.g., Medico*, 643 F.2d at 140 (“FBI documents concerning [the plaintiff] were compiled by government agents acting in their official capacities.”); *Dear v. Devaney*, 83 Mass. App. Ct. 285, 286, 292-93 & n.7 (2013) (holding that conditional privilege applies to police officers’ “report of their investigation” and noting that “[s]tatements made by public officials while performing their official duties are conditionally privileged” (quoting *Mulgrew v. Taunton*, 410 Mass. 631, 635 (1991))). And, where “[t]he statements and actions reported plainly implicated official duties and powers,” this Court has found that the privilege applies. *Howell*, 455 Mass. at 660.⁸

This case is thus readily distinguishable from *Reilly*, in which the court emphasized that

⁸ For the fair report privilege to apply, the report must also be “fair and accurate.” Here, the news item that accompanied the photographs of Butcher contained some minor inaccuracies, such as stating incorrectly that a student (rather than a bus driver) had reported the incident, but the Superior Court concluded correctly that these inaccuracies did not render the report not “fair and accurate.” *See* SA-III-50-52. The Appeals Court similarly held that the inaccuracies were not material, *see* Add. 31 (slip op. at 11) (“[T]he articles were ‘substantially true’ accounts of the contents of the police reports.”); it concluded that the fair report privilege did not apply so it did not reach the “fair and accurate” question.

“no police investigation or action” had resulted from the statement in question. 59 Mass. App. Ct. at 776. *Reilly* further explained that publication of the statement in that case ““thr[ew] no light upon the administration of justice”” because ““[b]oth form and contents depend[ed] wholly on the will of a private individual.”” *Id.* at 777 (quoting *Lundin*, 217 Mass. at 215-17). That is not the case here, where the police released the photographs in order to identify a person of interest in an active investigation. *See* SA-I-221-26 (recounting details of UMass-Boston police investigation following report from bus driver); *supra* pp. 5-6 & n.6. Thus, here, Mass Media’s publication of the photographs and blotter information stemmed from action by the police, not just a private individual’s statement, and illuminated the administration of justice by alerting the public to an ongoing police investigation into suspicious activity near the campus that Mass Media serves.

In holding that Mass Media’s publication of the photographs and blotter information was not privileged, the Appeals Court misread both *Reilly* and *Jones*. The court’s reliance on *Reilly*, Add. 33 (slip op. at 13), ignored the critical distinction just described: in *Reilly*, there was “no police investigation or action,” 59 Mass. App. Ct. at 776, whereas here, there was. And the court’s account of *Jones* is backwards, describing it as holding that “broadcast of police chief’s statements made during official press conference” was “protected by privilege.” Add. 32-33 (slip op. at 12-13 n.8). As discussed above, *Jones* specifically *declined* to hold that reporting the press conference was privileged, *see* 400 Mass. at 802; as explained in *Howell*, the *Jones* court concluded that “it was unclear on the record” whether the police statements in question were sufficiently “official” to justify the privilege, *see* 455 Mass. at 658 n.14. Finally, the Appeals Court failed to acknowledge that the police released the blotter information pursuant to their statutory duty under G.L. c. 41, § 98F – a critical point going directly to the “official” nature of

the actions in question and that further distinguishes this case from both *Reilly* and *Jones*. By misreading applicable law and ignoring key facts, the Appeals Court adopted an unduly narrow and problematic construction of the fair report privilege, as further described below.

B. Newspapers routinely report information that seems indistinguishable from the article found to be non-privileged in this case

The need for this Court’s intervention is especially acute because of the widespread practice that the Appeals Court’s decision calls into question. Newspapers routinely publish the content of police blotters, as well as other information – often including a photograph or other identifying details – obtained from the police about persons of interest to them.⁹ As Detective Parlon explained in this very case, this practice “is commonplace in policing to identify individuals ... the innocent as well as people who may be suspected of wrong doing.” SA-III-28. That is, in the course of their official duties, police often supply information to the media, which the media then publishes, in the hope of locating someone of interest whose identity is not yet known to the investigating police officers.

The Appeals Court’s opinion appears to render publication of this kind potentially defamatory and non-privileged – a development that has been described as “a surprise to local journalists” who “routinely report the contents of police logs, even where there’s no arrest.” Kris Olson, “Appeals Court revives suit against staffer of UMass-Boston campus newspaper,” *Mass. Lawyers Weekly*, Oct. 18, 2018, <https://masslawyersweekly.com/2018/10/18/appeals-court-revives-suit-against-staffer-of-umass-boston-campus-newspaper> (Add. 42-43). Prompt

⁹ *E.g.*, Alana Levene, “Police ask public to ID man who flashed teen girls at Seekonk Target,” *Boston Globe*, April 12, 2018, <https://www.bostonglobe.com/metro/2018/04/11/police-ask-public-man-who-flashed-teen-girls-seekonk-target/sfIJZlkOiaOSHUb7W69xI/story.html>; Alana Levene, “Police ask public to help ID man linked to Roslindale robbery and assault,” *Boston Globe*, March 25, 2018, <https://www.bostonglobe.com/metro/2018/03/25/police-ask-public-help-man-linked-roslindale-robbery-and-assault/3IbI0BTadj5laYinPiPH4N/story.html>. *See* Add. 39-41.

correction of the Appeals Court’s erroneous decision is needed to avoid unwarranted “chilling of speech protected by the First Amendment to the United States Constitution and [Mass. Const. pt. 1] art. 16,” *Commonwealth v. Lucas*, 472 Mass. 387, 390-91 (2015) – speech that often, as here, serves important public safety interests by assisting in police investigations. Conversely, if the law going forward in Massachusetts is to be that such reports are not privileged, it should be this Court that says so.

C. Case law in other jurisdictions generally favors treating fair reports of material obtained from law enforcement as privileged

The Appeals Court’s decision places Massachusetts out of step with other jurisdictions with respect to the line between privileged and non-privileged reports of information obtained from the police. Other courts, facing facts similar to those here, have held fair reports to be privileged. For example, in *Whiteside v. Russellville Newspapers, Inc.*, 295 S.W.3d 798 (Ark. 2009), a “case report” filed by a police officer that was “based on information obtained from the alleged victim and her cousin,” *id.* at 799, was accessed by a newspaper via a computer system that afforded media access to police documents. The court noted that “[c]ase law from various jurisdictions supports the principle that, generally, information released by the police, including reports and records, is considered to be a report of an official action subject to the fair-report privilege.” *Id.* at 802 (collecting state and federal cases). It concluded that “not only was a report filed based on these witness statements, *an investigation commenced* by both local and state police,” *id.* (emphasis added), and therefore the information acquired by the newspaper via the computer system and then published “was covered by the fair-report privilege.” *Id.*

Similarly, the Eighth Circuit applied Missouri law (which had adopted the fair report privilege set forth in Restatement § 611) to find that a television broadcast of information

contained in a “missing person report” and an “Investigative Report,” both of which were based on the allegations of the reporting person, together with a photograph of the alleged abductor, was privileged. *See Kenney v. Scripps Howard Broadcasting Co.*, 259 F.3d 922, 923-24 (8th Cir. 2001). And in *Medico v. Time, Inc.*, 643 F.2d 134 (3d Cir. 1981), the Third Circuit applied Pennsylvania law (also based on Restatement § 611, *see id.* at 138) to conclude that published accounts of confidential FBI reports, designated as “contain[ing] neither recommendations nor conclusions of the FBI,” *id.* at 139, and that “never led to an arrest or prosecution,” *id.*, were nonetheless privileged. The court observed that “the FBI documents concerning Medico were compiled by government agents acting in their official capacities.” *Id.* Notably, this Court repeatedly cited *Medico* in its most recent discussion of the fair report privilege. *See Howell*, 455 Mass. at 651, 652, 653, 653 n.9, 654 n.10, 657, 669.¹⁰

In sum, the Appeals Court’s decision appears out of line with cases from other jurisdictions, including some on which this Court has relied in its own discussions of the fair report privilege. The law on this important subject, and the media entities that must operate under it, would benefit immensely from this Court’s resolution of the questions presented.

¹⁰ The District of Columbia Court of Appeals took a somewhat different approach in *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78 (D.C. Ct. App. 1980), holding that material taken directly from a police “hot line” was not privileged. The “hot line” was a “means of providing reports about crimes and police activities to the media” whereby a public information officer from the police department would record a message containing a summary of information obtained from police officers from the relevant investigatory unit. *Id.* at 82 n.3. The court rejected a newspaper’s argument that reproducing material from the “hot line” constituted a privileged fair report: “the log represents little more than an informal arrangement between the police and the media, a joint venture, which consists of nothing more sanctified than unofficial statements of police regarding a crime.” *Id.* at 89. It concluded that, “[n]ot being an arrest record nor a record required by statute or some other authority, but instead merely constituting a hearsay statement by police of facts of a case, the hot line will not qualify as an official record for purposes of this privilege.” *Id.* This Court has appeared to express doubt about the conclusion in *Phillips*. *See Howell*, 455 Mass. at 658 n.15. In any event, the crucial distinction between the “hot line” and the blotter in this case is that the “hot line” in *Phillips* was an “informal arrangement” that was not “required by statute or some other authority,” 424 A.2d at 89, while the UMass-Boston police are required by statute to maintain a blotter, *see supra* p. 11.

II. The Appeals Court's Decision On Intentional Infliction Of Emotional Distress Is Inconsistent With This Court's Decisions And Threatens To Drastically Expand Tort Liability For Newspaper Reporters and Editors

Perhaps even more startling than the Appeals Court's reversal of summary judgment on the defamation claim is its reversal of summary judgment on the claim for intentional infliction of emotional distress. On a summary judgment record showing only that Vishniac was the student news editor of a campus newspaper that published information from a police blotter and photographs released by the police in the course of an investigation, the court concluded that there was sufficient evidence not only that Vishniac "'intended to inflict emotional distress or that [s]he knew or should have known that emotional distress was the likely result of [her] conduct,'" but also that "'the conduct was extreme and outrageous, was beyond all possible bounds of decency and was utterly intolerable in a civilized community.'" Add. 36 (slip op. at 16) (quoting *Agis v. Howard Johnson Co.*, 371 Mass. 140, 144-145 (1976)).

It is impossible to square the Appeals Court's decision with the high bar this Court set up in *Agis*. Again, Vishniac simply reproduced information that the police had made available, either pursuant to a statutory duty or in the course of an investigation. Nothing in the record indicates that she had any reason to doubt its accuracy or to think that the bus driver's allegations were false, nor does anything in the record indicate any ill will or nefarious motive on her part. To describe Vishniac's actions as potentially "beyond all possible bounds of decency" and "utterly intolerable in a civilized community" is not only to deprive those very strong words of their ordinary meaning, but is also to place newspaper reporters and editors in jeopardy of liability for intentional infliction of emotional distress in an exceedingly broad array of circumstances. There is nothing "extreme and outrageous," nothing "utterly intolerable," about a newspaper publishing material obtained from the police, even if that material later turns out to be

false. *Cf. Yohe v. Nugent*, 321 F.3d 35, 42, 45 (1st Cir. 2003) (applying Massachusetts law in finding that police chief’s public statements “may have contained inaccuracies” causing “some distress” to plaintiff, but that chief’s “conduct cannot in any way be described as ‘extreme and outrageous.’”).¹¹

¹¹ The Appeals Court relied on *Tech Plus, Inc. v. Ansel*, 59 Mass. App. Ct. 12 (2003), *see* Add. 37-38 (slip op. at 17-18), a case that undercuts rather than supports its conclusion. The defendant in *Tech Plus* had stated that an individual “was anti-Semitic, had made derogatory, anti-Semitic jokes and comments in his presence and was ‘constantly persecuting him’ because of his Jewish heritage. He also stated that [she] was prejudiced against homosexuals....” 59 Mass. App. Ct. at 16. The court found that conduct to be sufficiently “extreme and outrageous,” *id.* at 26, to allow an intentional infliction of emotional distress claim to go forward. But falsely claiming someone to be an anti-Semitic and anti-gay bigot cannot reasonably be compared to a newspaper editor publishing material she has obtained from the police and knew of no reason to question, even if that material turns out to contain false statements.

CONCLUSION

For the foregoing reasons, the application for further appellate review should be granted, limited to the issues presented herein.

Respectfully submitted,

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By her attorney,

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Dated: November 8, 2018

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2018, I served a copy of this application and addendum by first-class mail on the *pro se* plaintiff-appellant at the address set forth below.

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ADDENDUM

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17-P-161

Appeals Court

JON BUTCHER vs. UNIVERSITY OF MASSACHUSETTS & others.¹

No. 17-P-161.

Suffolk. April 11, 2018. - September 17, 2018.

Present: Milkey, Maldonado, & Wendlandt, JJ.

Practice, Civil, Summary judgment. Libel and Slander.
Newspaper. Damages, Libel. Emotional Distress.

Civil action commenced in the Superior Court Department on January 21, 2014.

The case was heard by Douglas H. Wilkins, J., on motions for summary judgment.

Jon Butcher, pro se.
Jean M. Kelley for the defendants.

WENDLANDT, J. This case presents the issue whether, in the absence of any official government action, the fair reporting privilege extends to a newspaper's publication of a witness's statement to police. The plaintiff, Jon Butcher, filed this

¹ Keith Motley, Winston Langley, Patrick Day, James Overton, Donald Baynard, Paul Parlon, Shira Kaminsky, Paul Driskill, Cady Vishniac, and Brian Forbes.

defamation action against the University of Massachusetts (UMass), a number of its employees (university defendants), and other individuals associated with its student newspaper (newspaper defendants),² after the newspaper published articles reporting that he allegedly had taken photographs of women without their permission on the campus of the University of Massachusetts-Boston (UMB). We hold that, prior to the commencement of official police action, the newspaper's publication of a witness's allegations to police officers was not protected by the fair reporting privilege. We thus reverse the Superior Court judge's allowance of summary judgment as to Butcher's defamation claim against the defendant Cady Vishniac. We also reverse the allowance of summary judgment on Butcher's intentional infliction of emotional distress claim against Vishniac. We otherwise affirm the judgment.

Background. "We recite the facts in the light most favorable to the plaintiff." Ravnikar v. Bogojavlensky, 438 Mass. 627, 628 (2003). The allegedly defamatory publications

² The newspaper defendants are Shira Kaminsky, Paul Driskill, and Cady Vishniac. The defendants assert that Butcher's claims against Kaminsky and Driskill have been dismissed because they were not served with the summons and complaint. The Superior Court docket reflects neither any proof of service nor a dismissal as to Kaminsky and Driskill. On appeal, Butcher does not address the status of service as to them. Pursuant to Mass. R. Civ. P. 4 (j), as appearing in 402 Mass. 1401 (1988), the time limit for service of the summons and complaint has expired.

concern an incident -- the details of which are disputed -- that took place at the John F. Kennedy Massachusetts Bay Transportation Authority station (JFK station) on the morning of March 13, 2013. At the time, Butcher worked as a security engineer in the information technology department at UMB, and regularly rode a shuttle bus from JFK station to campus.

That morning, the records of the UMB police department reflect that a UMB police officer responded to a report of suspicious activity that had taken place at JFK station. The officer arrived at the UMB campus and met with a bus driver for the private company that provided the shuttle service. The bus driver stated that he had observed Butcher taking photographs of women on the bus. The bus driver explained that he confronted Butcher, and Butcher responded by attempting to hide his face with a newspaper. Before exiting the bus, Butcher photographed the bus driver, and the bus driver photographed Butcher. The bus driver sent the officer his photograph of Butcher.

Following this report, Butcher, under the assumed name "Eric Jones," sent an electronic mail message (e-mail) to the UMB public safety department regarding the incident, and provided a different version of events. In the e-mail, Butcher indicated that the bus driver had falsely accused him of taking photographs of people on the bus, and then had become very hostile toward him. Butcher explained that the bus driver began

taking photographs of him and then physically blocked him when he tried to exit the bus. Butcher stated that he took photographs of the bus driver so that he could report the incident.

Sometime after the UMB officer met with the bus driver, the UMB student newspaper published an excerpt from the UMB police blotter regarding the incident:

"A suspicious white male in a black jacket took photographs and video of nearby women, as well as some buildings on campus. A witness stated that the party did not appear to be a student and was not wearing a backpack. The witness snapped a photograph of the suspect and shared that photograph with Campus Safety[.] Officers tried to locate the suspect at JFK/UMass Station, but could not find him."

Subsequently, on March 25, 2013, the newspaper published an article on its Web site, accompanied by a photograph of Butcher provided by the shuttle bus company, and a headline above the photograph stating, "Have You Seen This Man?" The article provided additional details regarding the incident covered in the police blotter:

"On the morning of March 13, the man in the photograph allegedly walked around the UMass Boston campus snapping pictures of female members of the university community without their permission. According to the student who reported him, he did not appear to be a student as he was not carrying a backpack. If you see him, please call Campus Safety at 617-287-7780."

Additionally, in its March 26 through April 9 print version, the newspaper published the same article as the one appearing on the

Web site, this time accompanied by two photographs of Butcher, under the same headline, "Have You Seen This Man?"

According to UMB police records, on March 27, after publication of these articles, two of the named university defendants, Detective Paul Parlon and Captain Donald Baynard of the UMB police department, met with Butcher to discuss the incident at JFK station. When they informed him that the UMB student newspaper had published his image along with the above described allegations, he became incensed. They then asked him whether he had taken photographs at the JFK station, to which he responded, "I take pictures of everything. I was taking pictures of the amount of buses and the structural area." He further stated that on that day he had been photographing "the sun and the flowers or something." He also explained that he had sent his earlier e-mail using the Eric Jones alias because he values his privacy, did not want to create problems at his workplace, and wanted to remain anonymous. At the conclusion of the meeting, Baynard and Parlon took possession of Butcher's UMass cellular telephone (cell phone) over Butcher's protests. Examination of the "Micro SD card" from the cell phone did not reveal any photographs of women from the day of the incident at the JFK station. The only photographs from that day were of buses and bus drivers at the JFK station.

In the months following the newspaper's publication of the above described articles, Butcher became distressed as he believed that he faced hostility on campus. He believed that people he passed on campus stared at him with fear and loathing. He also began walking from the JFK station to campus instead of taking the shuttle because the bus drivers would stare at him and kept copies of the newspaper articles regarding Butcher open on their dashboards. The campus environment made him fear both for his safety, and for the safety of his family.

Additionally, Butcher faced negative consequences at his workplace in the UMB information technology department. His relationship with the defendant Brian Forbes, his supervisor, deteriorated after the publications. For example, he was no longer given the opportunity to attend trainings regarding campus network security and implementation of new campus technology, and he was also removed from ongoing information technology department projects. In addition, he was given a higher volume of low-level assignments, including being tasked with responding to simple computer security inquiries from campus employees. Eventually, the stress, fear, and negative work environment caused Butcher to decide to leave his job, forfeiting his pension and benefits package. Although his current salary is higher than at UMB, he has less paid vacation time, sick time, and personal days.

Procedural history. In January, 2014, Butcher filed the present action in Superior Court, asserting six claims arising from the aforementioned publications: (1) defamation (against all defendants); (2) "declaratory judgment" (against all defendants); (3) "direction under false pretense" (against Forbes); (4) "illegal seizure without probable cause" (against Baynard and Parlon); (5) workplace retaliation (against Forbes); and (6) "emotional distress" (against all defendants). A Superior Court judge allowed the defendant Patrick Day's motion to dismiss as to all counts of the complaint, describing Day's motion as "without opposition"; allowed UMass's and the university defendants' motion to dismiss as to all counts³ except the claim for intentional infliction of emotional distress;⁴ and allowed Vishniac's motion to dismiss as to all counts except the defamation and intentional infliction of emotional distress claims. A different Superior Court judge then allowed the

³ The judge allowed UMass's and the university defendants' motion to dismiss the defamation claim on the ground that the complaint did not plead any role they played in the publication of the articles and photographs.

⁴ Butcher raises no argument on appeal regarding the dismissal of the other counts or the dismissal of all counts against Day. Accordingly all such arguments are waived. See U.S. Bank Nat'l Ass'n v. Schumacher, 467 Mass. 421, 426 n.10 (2014) (argument not addressed on appeal is waived); Mass. R. A. P. 16 (a) (4), as amended, 367 Mass. 921 (1975) ("The appellate court need not pass upon questions or issues not argued in the brief").

remaining defendants'⁵ motion for summary judgment on the remaining counts, and entered final judgment for all the defendants.

Discussion. We review the motion judge's allowance of summary judgment de novo to determine whether "there is [a] genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law" (quotation omitted). Dulgarian v. Stone, 420 Mass. 843, 846 (1995). See Mass. R. Civ. P. 56 (c), 365 Mass. 824 (1974). "The party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if he demonstrates . . . that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case" (quotation omitted). Dulgarian, 420 Mass. at 846.

1. Defamation. To establish a claim for defamation, a plaintiff must prove four elements: (1) the defendant made a false statement to a third party, (2) of or concerning the plaintiff, (3) that was capable of damaging the plaintiff's reputation in the community and that caused the plaintiff economic loss or is actionable without proof of economic loss, and (4) the defendant was at fault. See Ravnikar, 438 Mass. at

⁵ Vishniac was the only remaining defendant with regard to the defamation claim; Vishniac, UMass, and the university defendants (except Day) were the remaining defendants with regard to the intentional infliction of emotional distress claim.

629-630. Disposing of a plaintiff's case at the summary judgment stage is "especially favored" in the defamation context because "[a]llowing a trial to take place in a meritless case would put an unjustified and serious damper on freedom of expression. . . . Even if a defendant in a libel case is ultimately successful at trial, the costs of litigation may induce an unnecessary and undesirable self-censorship."

Dulgarian, 420 Mass. at 846-847, quoting King v. Globe Newspaper Co., 400 Mass. 705, 708 (1987), cert. denied, 485 U.S. 940 and 962 (1988). Despite these policy concerns, however, defendants in defamation cases still must "meet the usual burden under [Mass. R. Civ. P. 56] of demonstrating by evidence 'considered with an indulgence in the plaintiff's favor' the absence of disputed issues of material fact and their entitlement to judgment as a matter of law." Salvo v. Ottaway Newspapers, Inc., 57 Mass. App. Ct. 255, 259 (2003), quoting Mulgrew v. Taunton, 410 Mass. 631, 633 (1991).

Butcher's defamation claim rests on essentially two publications by the UMB student newspaper: (i) the excerpt from the police blotter, and (ii) the articles accompanied by the photograph(s) of him that were published on the newspaper's Web site and in its print edition. He argues that these publications damaged him by falsely branding him as a sexual

predator and, thus, subjected him to a campus and work environment that was so hostile that he was forced to leave.

a. Police blotter. With regard to the excerpt from the police blotter, Butcher's claim fails as a matter of law because this excerpt bears no indication that it was "of or concerning" Butcher. The only information identifying the individual referred to in the excerpt was that it was "[a] suspicious white male in a black jacket . . . [who] did not appear to be a student and was not wearing a backpack." Without more, these "words [cannot] reasonably . . . be interpreted to refer to the plaintiff." New England Tractor-Trailer Training of Conn., Inc. v. Globe Newspaper Co., 395 Mass. 471, 479 (1985).

b. Articles with photographs. We turn next to Butcher's claim regarding the articles accompanied by his photographs.⁶ Vishniac argues that Butcher cannot show an actionable false statement. Butcher makes two distinct claims regarding the falsity of the statements made in the published articles. We address each in turn.

i. Inaccurately reporting the witness's statements.

First, Butcher contends that the articles inaccurately reported

⁶ At the summary judgment stage, Vishniac argues only that Butcher has no reasonable expectation of proving at trial either that the articles contained an actionable false statement, or that he suffered cognizable harm. Vishniac does not contest that Butcher has sufficiently demonstrated the other two elements of his defamation claim -- namely that these articles were of or concerning Butcher and that there was fault.

the contents of the police reports of the underlying witness allegations. While there are discrepancies between the police records and the newspaper articles, the articles were "substantially true" accounts of the contents of the police reports. Reilly v. Associated Press, 59 Mass. App. Ct. 764, 770 (2003). The essence of Butcher's defamation claim is that the articles stigmatized him as a sexual predator by reporting that he had suspiciously taken photographs of women without their permission. The portion of the reporting that was inaccurate relative to the police records -- that it was a student, rather than a bus driver, who reported him, and that he took pictures on the campus as opposed to a shuttle bus -- "did not create a substantially greater defamatory sting than [the] accurate report." Jones v. Taibbi, 400 Mass. 786, 795 (1987).

ii. Fair report privilege. Second, Butcher maintains that the underlying witness allegations were themselves false.⁷ Vishniac responds only that the newspaper's publications are protected under the fair report privilege because they communicated the witness statements included in the UMass police blotter.

The fair report privilege protects publications that "fairly and accurately report certain types of official or

⁷ On summary judgment, Vishniac does not contend that the witness allegations are substantially true.

governmental action" even where the facts underlying the official action are defamatory. ELM Med. Lab., Inc. v. RKO Gen., Inc. 403 Mass. 779, 782 (1989). "For example, '[t]he publication of the fact that one has been arrested, and upon what accusation, is not actionable, if true," even where the accusations turn out to be false. Jones, 400 Mass. at 795, quoting Thompson v. Globe Newspaper Co., 279 Mass. 176, 188 (1932). This privilege is grounded in the policy that "(1) the public has a right to know of official government actions that affect the public interest, (2) the only practical way many citizens can learn of these actions is through a report by the news media, and (3) the only way news outlets would be willing to make such a report is if they are free from liability, provided that their report was fair and accurate." Yohe v. Nugent, 321 F.3d 35, 44 (1st Cir. 2003), quoting ELM Med. Lab., Inc., 403 Mass. at 782.

Here, the police made no arrest, no formal charges were filed, there was no official police statement, and no search warrant was issued.⁸ In these circumstances, the Supreme

⁸ Contrast Thompson v. Boston Publ. Co., 285 Mass. 344, 346-347 (1934) (report of allegations on which plaintiff was arrested after warrant was issued was privileged); Sibley v. Holyoke Transcript-Telegram Publ. Co., 391 Mass. 468, 471 (1984) (publication of statements contained in affidavit for search warrant, which later issued, covered under privilege); Jones, 400 Mass. at 795-797 (report that suspect had been charged with

Judicial Court has explained that "'statements made . . . by the complainant or other witnesses . . . as to the facts of the case or the evidence expected to be given are not yet part of the judicial proceedings or of the arrest itself and are not privileged' Restatement (Second) of Torts § 611 comment h (1977). Accordingly, '[t]here is also no privilege to report the unofficial talk of such officials as policemen, as distinct from their official utterances or acts, such as an arrest' W. Prosser & W. Keeton, [Torts § 112,] at 836 [(5th ed. 1984)]." Jones, 400 Mass. at 796. Thus, the fair report privilege "does not apply to witness statements to police, whether appearing in an official police report or not, where no official police action is taken." Reilly, 59 Mass. App. Ct. at 776. Such unconfirmed allegations have "neither the authority nor the importance to the public that other documents or statements shielded by the fair reporting privilege possess." Id. Extending the privilege to a witness's allegations merely because they appear in a police blotter does not further the doctrine's purpose of allowing the public to learn of official actions affecting the public interest. See id. at 777. See also Philips v. Evening Star Newspaper Co., 424 A.2d 78, 89 (D.C. 1980) (reporting on events documented in police activity

crime, and broadcast of police chief's statements made during official press conference, both protected by privilege).

log not privileged because, where there was no arrest, log did not "carry the dignity and authoritative weight as a record for which the common law sought to provide a reporting privilege"). Contrast Medico v. Time, Inc., 643 F.2d 134, 141-142 (3d Cir. 1981) (allegations in nonpublic, but official, Federal Bureau of Investigation investigatory reports submitted by Philadelphia field office qualified for privilege). In the circumstances of this case, the privilege does not apply.⁹

iii. Damages. Vishniac alternatively contends that summary judgment was proper because Butcher has no reasonable expectation of proving at trial that he has suffered a cognizable harm. "Damages in a defamation case are limited to actual damages, which are compensatory for the wrong that has been done." Draghetti v. Chmielewski, 416 Mass. 808, 815 (1994). These damages include "not only out-of-pocket expenses, but also harm inflicted by impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." Id. at 815-816, citing Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 861 (1975). When there is

⁹ The inapplicability of the fair report privilege here, of course, does not necessarily mean that there is liability for the newspaper's publication of any statements shown to be false. As set forth supra, Butcher must prove each element of the defamation claim, including fault, which "varies between negligence (for statements concerning private persons) and actual malice (for statements concerning public officials and public figures)." Ravnikar, 438 Mass. at 630.

evidence of mental suffering, "the plaintiff is entitled to recover for the 'distress and anxiety which may have been the natural result of the legal wrong.'" Shafir v. Steele, 431 Mass. 365, 373 (2000), quoting Markham v. Russell, 12 Allen 573, 575 (1866).

The record is sufficient to allow the trier of fact to reasonably conclude that Butcher has suffered actionable harm. Butcher testified that, after the articles were published, he faced a hostile campus that caused him mental distress and made him fear for his safety and the safety of his family. He also testified that, as a consequence of the articles, he lost the trust of his supervisor in the information technology department, and he was thus given less responsibility and handed a higher volume of lower-level work. He testified that he was compelled to leave his job, forfeiting a pension and benefits package.¹⁰ These harms stem from the defamatory publication that branded him a possible sexual predator to the campus community. Thus, Butcher has provided sufficient evidence of mental

¹⁰ For purposes of summary judgment, Butcher provides sufficient evidence that the campus environment and conditions of his employment became so hostile that he felt compelled to leave. See GTE Prods. Corp. v. Stewart, 421 Mass. 22, 34 (1995) (under theory of constructive discharge, employee may recover damages against employer even if employee leaves voluntarily where "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign" [quotation omitted]).

suffering, reputational harm, and economic loss to sustain an actionable claim for defamation. See Draghetti, 416 Mass. at 816 (sustaining jury award of damages to plaintiff where he testified that he suffered emotional distress, was ridiculed at work, and had marital problems due to defendant's defamation).

2. Intentional infliction of emotional distress.¹¹

Butcher's intentional infliction of emotional distress claim is premised on the same factual bases as his defamation claim. To sustain such a claim, a plaintiff must prove "(1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous, was beyond all possible bounds of decency and was utterly intolerable in a civilized community; (3) that the actions of the defendant were the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff was severe and of a nature that no reasonable man could be expected to endure it"¹² (citations and quotations omitted). Agis v.

¹¹ Butcher has not asserted a claim for negligent infliction of emotional distress.

¹² Because UMass is statutorily immune, summary judgment properly entered in favor of UMass as to Butcher's intentional infliction of emotional distress claim. See G. L. c. 258, § 10 (c); Lafayette Place Assocs. v. Boston Redev. Auth., 427 Mass. 509, 533-535 (1998), cert. denied, 525 U.S. 1177 (1999). See also Robinson v. Commonwealth, 32 Mass. App. Ct. 6, 9 (1992) ("[T]he University of Massachusetts is an agency of the

Howard Johnson Co., 371 Mass. 140, 144-145 (1976). A plaintiff faces a high burden in making a claim of intentional infliction of emotional distress; "[l]iability cannot be predicated on 'mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.'" Tetrault v. Mahoney, Hawkes & Goldings, 425 Mass. 456, 466 (1997), quoting Foley v. Polaroid Corp., 400 Mass. 82, 99 (1987).

Putting, as we must, "as harsh a face on [Vishniac's] actions . . . as the basic facts would reasonably allow," Richey v. American Auto. Ass'n, Inc., 380 Mass. 835, 839 (1980), a trier of fact could reasonably find that the publication both online and in print of Butcher's photographs alongside allegations that he was surreptitiously photographing women on campus was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Restatement (Second) of Torts § 46 comment d (1965). See Tech Plus, Inc. v. Ansel, 59 Mass. App. Ct. 12, 26 (2003) (jury permitted to find extreme and outrageous conduct where defendant made multiple statements to his colleagues that

Commonwealth under G. L. c. 258"). We also agree with the university defendants that summary judgment as to this claim should enter as to them because, as with the defamation claim, none of the university defendants is alleged to have been responsible for the publication giving rise to the claim. See note 3, supra. This claim is potentially viable only against the remaining newspaper defendant, Vishniac. See note 2, supra.

plaintiff, fellow colleague, had engaged in anti-Semitic and homophobic behavior in the past).

Conclusion. So much of the judgment as relates to the defamation and intentional infliction of emotional distress claims against Vishniac is reversed. In all other respects, the judgment is affirmed.

So ordered.



Metro

Police ask public to ID man who flashed teen girls at Seekonk Target

By Alana Levene

GLOBE CORRESPONDENT APRIL 12, 2018

A man allegedly followed a group of teenage girls to their car and then pulled his pants down in a Target store's parking lot in Seekonk last month, police said.

Police [posted photos of the man](#) on social media on Wednesday, asking the public to help identify him.

On March 20, the man allegedly followed the teens around the store's aisles for about 20 minutes, and then left and waited outside the store, police said in a Facebook post.

"The suspect then stood beside the victims' vehicle, pulled his pants down and exposed himself," police said.

The man is described as of Hispanic or Latino descent, and between 5 feet 5 and 5 feet six inches tall with "scruffy facial hair," according to police. The teens said he spoke with a "thick Hispanic accent."

Anyone with information about the man's identity is asked to call Seekonk police at 508-336-7027.

Alana Levene can be reached at alana.levene@globe.com. Follow her on Twitter [@alanalevene](#).

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Metro

Police ask public to help ID man linked to Roslindale robbery and assault

By Alana Levene

GLOBE CORRESPONDENT MARCH 25, 2018

Boston police are asking the public to help identify a man who they say attempted to rob a Roslindale store and assaulted two employees on Wednesday.

Police released surveillance footage of the man at Cummins Market around 2:20 p.m., but he was already gone by the time police arrived.

The man also “physically assaulted two of the employees before fleeing on foot” down American Legion Highway toward Stella Street, according to a statement released Friday by police.

“This person is not wanted at this time, and the information is being provided for identification purposes only,” police wrote in a statement.

The statement described the suspect as a black male with a bald or shaved head, approximately 38 to 40 years old, about 6 feet tall, and 220 pounds with a stocky build.

Surveillance footage shows the man wearing a hard hat and orange work vest over a navy coverall jumpsuit, a gray hoodie, and Timberland-style work boots.

According to one witness, he is missing his bottom front teeth, police said.

Add. 40



BOSTON POLICE DEPARTMENT

“This person is not wanted at this time, and the information is being provided for identification purposes only,” police said.

Anyone with information is asked to contact District E-18 detectives at (617) 343-5607.

Tips can also be provided anonymously by calling the CrimeStoppers Tip Line at 1-(800)-494-TIPS, or texting the word 'TIP' to CRIME (27463).

Correspondent Samantha J. Gross contributed. Alana Levene can be reached at alana.levene@globe.com. Follow her on Twitter [@alanalevene](https://twitter.com/alanalevene).

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Appeals Court revives suit against staffer of UMass-Boston campus newspaper

By: Kris Olson October 18, 2018



Acting pro se, a former employee of the University of Massachusetts-Boston has convinced the Appeals Court to revive his claims of defamation and intentional infliction of emotional distress against a student staff member of the campus newspaper after it published a disputed accusation that the employee had taken photos of women on a shuttle bus to campus.

Earlier, Superior Court Judge Douglas H. Wilkins had granted defendant Cady Vishniac summary judgment on plaintiff Jon

Butcher's claims. But the Appeals Court subsequently held that, because the police had not taken any official action on what a bus driver said he witnessed, the newspaper's references to the allegations were not protected by the fair report privilege.

"This opinion is bothersome and will come as a surprise to local journalists, who frequently rely on and repeat statements made in police 'blotters,'" says Boston media attorney Jeffrey J. Pyle.

On the morning of March 13, 2013, Butcher, a security engineer in UMass-Boston's information technology department, had an altercation with the driver of the shuttle bus he regularly took from the John F. Kennedy MBTA station to campus.

The bus driver told campus police that he had confronted Butcher after seeing him taking photographs of women on the bus. Butcher responded by attempting to hide his face with a newspaper, the driver said. The encounter ended with each party photographing the other before Butcher exited the bus.

Using a pseudonym to protect his privacy, Butcher emailed campus police to provide a different account, saying the driver had become hostile toward him after falsely accusing him of taking the photos, going so far as to block him from exiting the bus.

Initially, the student newspaper published an excerpt from the campus police blotter, which identified the person who had allegedly taken photographs and video of nearby women only as "a suspicious white male in a black jacket."

More problematic was an item first appearing on the newspaper's website and later in print in which Butcher's photo, provided by the shuttle bus company, appeared alongside the headline, "Have You Seen This Man?" Readers were directed to contact the UMass-Boston Police Department if they had.

After the articles were published, two members of the school's Police Department met with Butcher and informed him for the first time of the newspaper accounts. He "became incensed," according to the Appeals Court's opinion.

Butcher explained that he took photos of "everything." On that day in question, he had been photographing "the sun and the flowers or something," he told the officers.

Over Butcher's protests, the officers took possession of his school-issued cellphone but found no photos of women on the phone's memory card from the day of the shuttle bus incident, just images of the buses and drivers at the JFK station.

In the months after the newspaper articles appeared, Butcher said, he faced hostility on campus and saw his relationship with his supervisor deteriorate, which eventually caused him to leave his job, forfeiting his pension and benefits package, the Appeals Court's opinion notes. Butcher has since landed a new job with a higher salary but less paid time off.

Vishniac, the campus newspaper staffer, believed that she was on safe ground by culling the articles from the witness statements included in the UMass police blotter.

But the police had made no arrest, no formal charges had been filed, and no search warrant had been issued. In such circumstances, the Supreme Judicial Court had decided that the fair report privilege should not apply, the Appeals Court noted.

“Extending the privilege to a witness’s allegations merely because they appear in a police blotter does not further the doctrine’s purpose of allowing the public to learn of official actions affecting the public interest,” Judge Dalila A. Wendlandt wrote for the panel.

Pyle disagrees, noting that the purpose of the statute requiring municipal and university police departments to keep and maintain a daily log, G.L.c. 41, §98F, is “to give the public an understanding of what the police are doing, and [provide] a window into potential crimes in the neighborhood.”

Though the Appeals Court likened the log to the “unofficial talk” of policemen, the Prince, Lobel, Tye partner says he has a hard time with that characterization, particularly where the statute requires the log be kept.

Pyle notes that community newspapers routinely report the contents of police logs, even where there’s no arrest. In some cases, the purported offender may be identifiable based on the address of the occurrence, for example.

“If you can only safely report on police calls that result in an arrest, that will drastically limit the information newspapers provide their readers when they reprint police blotter information,” he says.

Pyle thinks the Appeals Court’s opinion implicitly endorses a faulty assumption: that there’s no public interest in knowing about police inaction. He offers a hypothetical of a police blotter that contains a bartender’s allegation that the town’s mayor was drunk and sexually harassed a woman at a bar. The police never made an arrest in the case, but a newspaper quoted the bartender’s statement in a story based on the blotter report.

Under the rationale of *Butcher*, the paper would not be able to rely on the fair report privilege, which Pyle does not think would be a good result.

“If the police didn’t act, the public deserves the opportunity to ask why,” he says.

Denise Barton, UMass senior litigation counsel, says the school is considering its options, which include seeking further appellate review. She declined to comment further.

Butcher did not respond to a request for comment.

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