No. _____

IN THE

Supreme Court of the United States

JON BUTCHER,

Petitioner,

v.

CADY VISHNIAC,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT ("SJC") OF THE COMMONWEALTH OF MASSACHUSETTS

APPENDIX

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At Cambridge, Massachusetts,
This 27th Day of May, 2020

APPENDIX A

SUPREME JUDICIAL COURT OF MASSACHUSETTS

Jon Butcher,

v.

University of Massachusetts *et al.*[1]

October 1, 2019, Argued; December 31, 2019, Decided
SJC-12698.

Counsel: Jon Butcher, *pro se.*

David C. Kravitz, Deputy State Solicitor (Denise Barton also present) for Cady Vishniac.

Zachary C. Kleinsasser, for Gatehouse Media, LLC, & others, amici curiae, submitted a brief.

Judges: Present: GANTS, C.J., LENK, GAZIANO, LOWY, BUDD, CYPHER, & KAFKER, JJ.

OPINION

LENK, J. In March of 2013, the University of Massachusetts Boston (UMass) police department received a report that an unknown man was engaging in suspicious

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

activity near the UMass campus. The police included an account of this report, and their attempts to find the unknown man, in their daily public police log (blotter). At the time this activity was reported, defendant Cady Vishniac was a UMass student and the news editor of the school newspaper, Mass Media. Mass Media republished the blotter entries for that week, including the report of the unknown man's allegedly suspicious activities. After the UMass police were unable to locate the man, a UMass police officer sent a photograph to Mass Media asking for help in identifying him. Mass Media republished a version of the report, accompanied by the photograph. Soon after the photograph was released, the previously unknown man was identified as the plaintiff.

According to the plaintiff, these reports, which circulated for over one week without his knowledge, were utterly false. Indeed, he asserts that he is a victim twice over: first, of an assault by a bus driver, and, thereafter, by the publication of slanderous stories that suggested he was a sexual predator.

The plaintiff commenced this action against UMass and a number of individually named defendants, largely UMass employees or former employees, for their role in spreading the purportedly false reports about him. The decisive question in this case is whether a newspaper can be liable for republishing public police logs and requests for assistance received from a police department. We conclude that, based on the particular facts of these publications, the fair report privilege shielded Vishniac from liability.[2]

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[2] We acknowledge the amicus brief submitted by Gatehouse Media, LLC; Associated Press; Reporter's Committee for Freedom of the Press;

1. Background. a. Facts. "We recite the facts in the light most favorable to the plaintiff." *Ravnikar v. Bogojavlensky*, 438 Mass. 627, 628, 782 N.E.2d 508 (2003). The publications at issue refer to an alleged incident that occurred on March 13, 2013. At that time, the plaintiff was employed as a security engineer with the information technology department at UMass. At around 10 A.M. that morning, UMass police officers responded to a report of suspicious activity at the John F. Kennedy station on the Massachusetts Bay Transportation Authority's Red Line (JFK Station). When police arrived, they met with a bus driver who informed them that he had observed a suspicious male taking photographs of women on the bus. Police then interviewed a second witness, a bus company employee, who also said that the bus driver had observed a man taking photographs of people. The employee, who was a bus starter, indicated that the suspicious male was wearing dark glasses and did not appear to be a student. The employee got on the bus and sat next to the individual in an effort to dissuade him from taking any more photographs.

The plaintiff offers a very different account of this incident. He states that he was on his way to work at UMass when he decided to take photographs of the buses housed at the JFK Station. The purpose of those photographs was to document what he saw as serious safety concerns regarding the bus company and its drivers.[3] He believed that he had permission to take these

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New England First Amendment Coalition; and Massachusetts Newspapers Publishers Association.

[3] Approximately one year after this purported incident, the bus company was in fact shut down due to a host of safety issues.

photographs, in part, because the bus company was engaged in an ongoing union dispute, and the union had encouraged members to document any problems. The plaintiff contends that a bus driver saw what he was doing, accused him of taking photographs of the driver, and proceeded to accost him. Then, the driver attempted to block the plaintiff from leaving the bus. The altercation only ended when the plaintiff left the bus and the driver sped off. That afternoon, the plaintiff sent an electronic mail message to the UMass office of public safety, under the pseudonym "Eric Jones," describing this encounter.[4] Police replied to the message on March 15, but received no response.

The police included only a report of the bus driver's version of events in the UMass police blotter. The police blotter for March 10, 2013, through March 16, 2013, later was republished by Mass Media.[5] In that online publication, all of the week's blotter entries were listed, verbatim, in chronological order by the date and time that the report had been made. The report of the JFK Station incident stated:

> "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

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[4] The plaintiff's message reported how "Eric Jones" had been attacked by a Crystal Transportation bus driver between 9:30 and 9:45 a.m. that morning. It also indicated that this incident was only the most recent unsafe behavior that he had observed on the part of that company's bus drivers.

[5] The parties contest precisely when this republication occurred.

> 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."

On March 22, 2013, UMass police received photographs from the bus company that supposedly depicted the man who had been reported to be taking photographs of women. Officers added the photographs to their internal incident report.[6]

UMass administrators became concerned about the activities of the as-yet unidentified "Eric Jones." At the request of the UMass police, the photographs supplied by the bus company were provided to Mass Media in order to assist police in identifying the then unknown man. On March 25, 2013, Mass Media published an article in their electronic edition under the title, "Have you Seen This Man?" Unlike the previous publication of the blotter, this article provided an account only of the JFK Station incident and included the photograph supplied by the UMass police. It stated:

> "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

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[6] This report also included witness narratives of the incident, the identity of the responding officers, and the current status of the police investigation. It was not published in the blotter or otherwise released to the public.

> to be a student as he was not carrying a backpack. If you see him, please call Campus Safety ...."

The same article was included in the print version of the Mass Media newspaper that ran from March 26, 2013, through April 9, 2013.

On March 27, 2013, the plaintiff was identified by a coworker as the man in the photograph. His supervisor brought him to the UMass police department so security officers could speak with him. The plaintiff was upset when he learned that his photograph had been placed in the article published by Mass Media. He acknowledged that he had sent the electronic mail message from "Eric Jones," in order to preserve his privacy, but insisted that he had done nothing wrong and that he sought only to protect himself from the attack of the bus driver and the unsafe conditions on the bus. UMass police took possession of the plaintiff's UMass-owned cellular telephone, which was issued in conjunction with his job,[7] and later conducted a search of the image files stored on it with the assistance of an assistant district attorney. None of the files dated March 13, 2013, were photographs of women. Instead, several photographs from the time of the incident depicted buses and a bus driver.

In the months following the publication of this story, the plaintiff sensed lingering hostility around the UMass campus. He noticed that bus drivers would slow down and stare at him as they passed. He also perceived repercussions at his work. Coworkers asked him if he had

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[7] The cellular telephone itself was owned by UMass; the plaintiff maintains that the card seized was his private property.

seen the newspaper articles. His workload was increased, and he was left out of critical meetings. Finally, seven months after the publication, the plaintiff left his job at UMass.

b. Procedural history. In January 2014, the plaintiff, acting *pro se*, filed a six-count complaint in the Superior Court against UMass and several individual defendants. In May 2015, a Superior Court judge allowed the defendants' motion to dismiss pursuant to Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974), and dismissed all of the counts except the plaintiff's claims of defamation against Vishniac and intentional infliction of emotional distress against Vishniac and defendants University of Massachusetts, Keith Motley, Winston Langley, Hanes Overton, Donald Baynard, Paul Parlon, and Brian Forbes (collectively, the University defendants).

The University defendants and Vishniac jointly filed a motion for summary judgment in September 2016; the motion was granted in November 2016. In allowing the motion for summary judgment, the judge determined that the content of the articles was both attributed to official police logs and a substantially accurate account of those logs. He concluded, therefore, that the purportedly defamatory statements fell under the "fair report privilege" and, as such, were not actionable.

The plaintiff appealed and, in September 2018, the Appeals Court reversed the judgment as to Vishniac, after concluding that the fair report privilege did not apply. *See Butcher v. University of Mass.*, 94 Mass. App. Ct. 33, 34, 111 N.E.3d 294 (2018). We granted the defendants'

application for further appellant review, limited to the claims against Vishniac.

2. Discussion. We favor summary judgment in defamation cases, in light of the chilling effect that the threat of litigation can have on activities protected by the First Amendment to the United States Constitution. *See King v. Globe Newspaper Co.*, 400 Mass. 705, 708, 512 N.E.2d 241 (1987) ("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"); *New England Tractor-Trailer Training of Conn., Inc. v. Globe Newspaper Co.*, 395 Mass. 471, 476, 480 N.E.2d 1005 (1985), cert. denied, 485 U.S. 836 (1988). Nonetheless, to prevail on a motion for summary judgment in a defamation action, the moving party must meet the usual burden under Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1401 (2002). *See Mulgrew v. Taunton*, 410 Mass. 631, 633, 574 N.E.2d 389 (1991).

Summary judgment is warranted where "there is no genuine issue of material fact and, where viewing the evidence in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law." *Harrison v. NetCentric Corp.*, 433 Mass. 465, 468, 744 N.E.2d 622 (2001). See Mass. R. Civ. P. 56 (c). Because the plaintiff ultimately would bear the burden of proof at trial, Vishniac "is entitled to summary judgment if [she] demonstrates ... that [the plaintiff] has no reasonable expectation of proving an essential element of [his] case." *Dulgarian v. Stone*, 420 Mass. 843, 846, 652 N.E.2d 603 (1995), quoting *Symmons v. O'Keeffe*, 419 Mass. 288, 293, 644 N.E.2d 631 (1995).

a. Defamation. To withstand a motion for summary judgment on his defamation claim, the plaintiff is required to demonstrate that "(a) [t]he defendant made a statement, concerning the plaintiff, to a third party ... [;] (b) [t]he statement could damage the plaintiff's reputation in the community ... [;] (c) [t]he defendant was at fault in making the statement ... [; and] (d) [t]he statement either caused the plaintiff economic loss ... or is actionable without proof of economic loss" (citations omitted). *Ravnikar*, 438 Mass. at 629-630.

It makes no difference that Mass Media only republished the allegedly defamatory statements of another. "[O]ne who repeats [**10] or otherwise republishes defamatory matter is subject to liability as if he had originally published it." Restatement (Second) of Torts § 578 (1981). *See Appleby v. Daily Hampshire Gazette*, 395 Mass. 32, 36, 478 N.E.2d 721 (1985). In the eyes of the law, "[t]ale-bearers are as bad as the tale-makers."[8]

i. Fair report privilege. In allowing the defendants' motion for [*748] summary judgment, the motion judge relied upon an exception to the republication rule: the fair report privilege. Under early common law, newspapers and other types of journalists were subject to the republication rule like any other defamer. *See Medico v. Time, Inc.*, 643 F.2d 134, 137 (3d Cir.), cert. denied, 454 U.S. 836, 102 S. Ct. 139, 70 L. Ed. 2d 116 (1981). Recognizing the chilling effect this could have on media reporting, by the late

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[8] R.B. Sheridan, The School for Scandal, act I, scene i, in R.B. Sheridan, The School for Scandal and Other Plays 197 (Penguin Classics ed., 1988) (originally published in 1777).

Eighteenth Century[9] courts began to develop the fair report privilege as a "safety valve" for the press. *See Howell v. Enterprise Publ. Co.*, 455 Mass. 641, 651, 920 N.E.2d 1 (2010); 1 R.D. Sack, Defamation § 2:7, at 2-118 (5th ed. 2019).

Originally, the fair report privilege only shielded the press when it reported on defamation in judicial proceedings that happened in open court. *See Barrows v. Bell*, 73 Mass. 301, 7 Gray 301, 312 (1856) (describing British common-law approach). Early in the Commonwealth's history, however, the privilege expanded to encompass a broader array of judicial actions. *Compare Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884) (no privilege in absence of judicial action on petition), *with Thompson v. Boston Publ. Co.*, 285 Mass. 344, 347, 189 N.E. 210 (1934) (issuance of warrant by clerk was privileged); *Kimball v. Post Publ. Co.*, 199 Mass. 248, 249-250, 85 N.E. 103, (1908) (privilege attached to order to show cause). Executive actions of a quasi judicial nature eventually came within the scope of the privilege as well. *See Conner v. Standard Publ. Co.*, 183 Mass. 474, 479, 67 N.E. 596 (1903) (fire marshal report); *Barrows*, *supra* at 315-316 (medical board).

In its modern conception, the fair report privilege has grown beyond its judicial or quasi judicial roots. It has been described as follows:

> "The publication of defamatory matter concerning another in a report of an official

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[9] See Note, Privilege to Republish Defamation, 64 Colum. L. Rev. 1102, 1102 (1964), citing *King* v. *Wright*, 8 Durn. & E. 293, 101 Eng. Rep. 1396 (K.B. 1799) (discussing emergence of fair report privilege).

> action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgment of the occurrence reported." Restatement (Second) of Torts § 611 (1981).

When distinguishing "official" actions, which are privileged, from "unofficial" actions, which are not, commentators and courts consider two primary policy justifications: the "agency" rationale and the "public supervision" rationale. *See Sack, supra* at § 7:3.5, at 7-28. Under the agency rationale, the press acts as the "eyes and ears" of the public by bringing them news of reports and activity that they have the right to observe. *ELM Med. Lab., Inc. v. RKO Gen., Inc.*, 403 Mass. 779, 783, 532 N.E.2d 675 (1989), overruled on another ground by *United Truck Leasing Corp. v. Geltman*, 406 Mass. 811, 551 N.E.2d 20 (1990). Under the "now predominant" public supervision rationale, *Sack, supra*, the fair report privilege is crafted to "promote[ ] our system of self-governance." R.A. Smolla, Law of Defamation § 8:3, at 8-8 (2d. ed. 2019). "By subjecting to exacting public scrutiny the machinations of government agencies, the news media makes government officials accountable to the public in the performance of their duties." *Ingenere v. American Broadcasting Cos.*, 11 Media L. Rep. 1227, 1229 (D. Mass. 1984). Accordingly, the public supervision rationale recognizes 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, 43 (1st Cir. 2003).

We also are mindful that the fair report privilege implicates competing constitutional concerns.[10] On one side of the scale, the fair report privilege "clearly partakes of First Amendment values, and it has been suggested that the privilege (in some form) should perhaps be understood as required by modern First Amendment principles." Smolla, supra at § 8:67, at 8-127. *See* B.W. Sanford, Libel and Privacy § 10.2, at 10-15 (2d. ed. Supp. 2019) (accord).[11] As the United States Supreme Court noted in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), ensuring that the press can report freely on public affairs "requires that we protect some falsehood in order to protect speech that matters." On the other side, defamatory statements impede society's interest in preserving each individual's right to privacy[12] and freedom from defamation.

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[10] See Wright, Defamation, Privacy, and the Public's Right To Know: A National Problem and a New Approach, 46 Tex. L. Rev. 630, 634 (1968); Moore, A Newspaper's Risks in Reporting Facts from Presumably Reliable Sources: A Study in the Practical Application of the Right of Privacy, 22 S. C. L. Rev. 1, 33 (1970).

[11] "Although we have 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." Howell v. Enterprise Publ. Co., 455 Mass. 641, 654 n.10, 920 N.E.2d 1 (2010).

[12] As future United States Supreme Court Associate Justice Louis D. Brandeis and Samuel D. Warren wrote in their seminal work, "[t]he design of the law must be to protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons, whatsoever; their position or station, from having matters which they

Recognizing these competing interests, "[o]ur cases have taken an expansive but not unlimited view of what qualifies as an 'official' action" to which the fair report privilege applies. *Howell*, 455 Mass. at 654. In this case, we are concerned with "reports of official statements" and "reports of official action," "both of which are covered by the fair report privilege."[13] *Id.* at 657.

"Official statements" typically are either "on-the-record statements by high-ranking (authorized to speak) officials," or "published official documents." Howell, 455 Mass. at 658. Although other, less formal statements also may qualify, anonymous statements, *id.*, and "mere allegations made to public officials," *id.* at 658 n.14, do not. *See Jones v. Taibbi*, 400 Mass. 786, 796, 512 N.E.2d 260 (1987) ("unofficial statements made by police sources are outside the scope of the fair report privilege"). "Official actions" are those that involve the "administration of public duties," or "the exercise of the power of government to cause events to occur or to impact the status of rights or resources." *Howell, supra* at 654. Unlike official statements, "if the unattributed statement reflects official action, the source of the statement is unimportant." *Id.* at 659 n.16. In sum, the contemporary fair report privilege is a "safe harbor for those who report on statements and actions so long as the statements or actions are official and

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may properly prefer to keep private, made public against their will." S. Warren and L. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 214-215 (1890).

[13] The fair report privilege also clearly would apply to "a public hearing before a judge or the Legislature or some other governmental body." See Howell, 455 Mass. at 656. No such proceedings, however, are at issue in this case.

so long as the report about them is fair and accurate" (emphasis added). *Howell, supra* at 651.

ii. Police blotters. Vishniac maintains that, because the blotters were public records, any statements contained within them were privileged. The public nature of these records, however, does not dictate the outcome here.

Clearly, police blotters, like those at issue here, are statutorily-mandated public records. *See* G. L. c. 41, § 98F.[14] We have never held, however, that all reports based on public records are privileged. In *Sanford v. Boston Herald-Traveler Corp.*, 318 Mass. 156, 158, 61 N.E.2d 5 (1945), we rejected such a per se rule, stating that "we are not prepared to concede that the general right of inspection of public records enables one in every instance to publish such records broadcast without regard to the truth of defamatory matter contained in them." Rather, we look to the contents of the actual records themselves to determine whether they are reports of either official statements or official actions. *See Howell*, 455 Mass. at 654.

Police departments are required to issue daily reports of three kinds of events: "responses to valid complaints received," "crimes reported," and "the names, addresses of persons arrested and the charges against such

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[14] "Each police department and each college or university to which officers have been appointed pursuant to [G. L. c. 22C, § 63,] shall make, keep and maintain a daily log, written in a form that can be easily understood, recording, in chronological order, all responses to valid complaints received, crimes reported, the names, addresses of persons arrested and the charges against such persons arrested. All entries in said daily logs shall, unless otherwise provided in law, be public records available without charge to the public during regular business hours and at all other reasonable times ...."

persons arrested." G. L. c. 41, § 98F. While G. L. c. 41, § 98F, makes all these reports available to the public, the fair report privilege does not sweep as broadly. To be sure, we have held that some required blotter entries, most notably reports of arrests, are privileged reports of official actions. *See Jones*, 400 Mass. at 795 ("The publication of the fact that one has been arrested, and upon what accusation, is not actionable, if true" [citation omitted]). Other entries required by G. L. c. 41, § 98F, however, fall outside the scope of reports that we have treated as privileged. A "report of a crime," for example, may consist of an anonymous complaint accusing a person of committing a crime.[15] Such anonymous accusations, without a subsequent response by police, are neither official statements nor official actions cloaked by the fair report privilege. *See Reilly v. Associated Press*, 59 Mass. App. Ct. 764, 776-777, 797 N.E.2d 1204 (2003). *See also Cowley*, 137 Mass. at 394 (where "[b]oth form and contents depend wholly on the will of a private individual," statements are not privileged); Smolla, *supra* at § 8:72, at 8-142 (accord).

Moreover, blotters may contain entries that are not required by statute.[16] The blotter in this case, for example,

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[15] The blotter in this case includes one such report of a crime: "A vandal smashed the window of a car parked in the South Lot. The owner of the vehicle stated that nothing had been stolen and that she did not know why anybody would deliberately damage her car." The blotter includes no reference to a subsequent police response.

[16] Pursuant to G. L. c. 41, § 98F, the only records that police may not include in a public blotter are

> "(i) any entry in a log which pertains to a handicapped individual who is physically or mentally incapacitated to the degree that said person is confined to a wheelchair or is bedridden or requires the use of a

listed fourteen entries over a period of six days. Of those, at least three were not reports of arrests, crimes reported, or responses to valid complaints.[17] None of those three entries was an official statement or demonstrated official police action beyond the mere act of placing an entry in the blotter.

Neither the language nor the legislative history of G. L. c. 41, § 98F, indicates that the Legislature intended to expand the fair report privilege to otherwise unprivileged blotter entries. The statute itself says nothing about the fair report privilege. When the Legislature first enacted this statute in 1980, see "An Act relative to the keeping of a daily log by police departments," St. 1980, c. 142, it debated how the proposed statute would expand press access to police logs. During those debates, legislators expressed concerns about the ways in which the statute could expose the lives of private citizens to the public. *See, e.g.*, Senate Floor Debate, Apr. 22, 1980. In urging other

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> device designed to provide said person with mobility, (ii) any information concerning responses to reports of domestic violence, rape or sexual assault, (iii) any entry concerning the arrest of a person for assault, assault and battery or violation of a protective order where the victim is a family or household member, as defined in [G. L. c. 209A, § 1], or (iv) any entry concerning the arrest of a person who has not yet reached [eighteen] years of age."

[17] These three entries state: (1) "A piece of yellow pipe was left lying on the ground in the Clark Lot. A car rolled over the pipe, slashing the tire"; (2) "A student in the Clark Lot reported that she felt ill and nauseous. Emergency personnel treated the student, but she refused to go to the emergency room"; and (3) "A teenager in the Upward Bound program tried to run away and then physically harmed herself. An ambulance transported her to Boston Medical Center."

members to support the bill, its sponsor emphasized that the legislation would require a public listing only of actual arrests, not of all calls that police receive or all incidents that are reported. *See Public Arrest Log Bill Hits Snag in the Senate,* Boston Globe, Apr. 17, 1980.

More than a decade after G. L. c. 41, § 98F, was enacted, in 1991 the Legislature amended this statute to require certain school safety officers to maintain the same types of blotters as other police officers. See St. 1991, c. 125. This amendment came on the heels of several high-profile attempts by student journalists to gain access to school security logs. *See Campus crime logs to be open to public: Weld signs bill allowing daily review*, Boston Globe, July 15, 1991. Even then, however, the Legislature did not amend G. L. c. 41, § 98F, to create a statutory fair report privilege for blotters. It does not appear that, at any stage of this statute's development, the Legislature ever contemplated codifying a form of the fair report privilege.

As a practical matter, moreover, we do not think a blanket privilege is necessary to ensure that the press are able to report on blotter entries. Even without the privilege, most statements in a blotter will not be actionable because they are not "of and concerning" a particular person. *See Hanson v. Globe Newspaper Co.*, 159 Mass. 293, 294, 34 N.E. 462 (1893). At the very least, a plaintiff alleging defamation must establish "that the defendant was negligent in publishing words which reasonably could be interpreted to refer to the plaintiff." *New England Tractor-Trailer Training of Conn., Inc.*, 395 Mass. at 479. Here, the first publication referred only to a "suspicious white male in a black jacket ... [who] did not appear to be a student and was not wearing a backpack."

No one reasonably could have interpreted this bare-bones description, without more, as referring specifically to the plaintiff. Accordingly, regardless of whether the privilege applied, this claim would fail as a matter of law.

Extending the fair report privilege to cover all statements in police blotters would blur the line we have drawn between privileged official statements and actions, and unprivileged unofficial ones. Further, as some commentators have noted, extending the privilege would create a risk that blotters could become "a tempting device for the unscrupulous defamer" who could report, anonymously, scandalous accusations, knowing they could be "given wide currency in the tabloids and newspapers." *See* 2 F.V. Harper, F. James, Jr., & O.S. Grey, Torts § 5.24, at 243 (3d ed. 2006) (describing applicability of fair report privilege to groundless law suits). Facilitating defamation in this way, when the press otherwise can report on the vast majority of blotter entries without risk of liability, would not serve the public interests that underlie the fair report privilege. We decline, therefore, to apply the fair report privilege to all statements of any type contained in any police blotter.[18]

iii. First publication. The first purportedly defamatory statements consisted of a verbatim republication of a blotter entry. Rather than merely

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[18] We recognize that some other jurisdictions have reached a different result and have determined that public blotters in their entirety are privileged. See Whiteside v. Russellville Newspapers, Inc., 2009 Ark. 135, 295 S.W.3d 798, cert. denied, 558 U.S. 876, 130 S. Ct. 247, 175 L. Ed. 2d 130 (2009) (collecting cases). Our decision reflects the more narrow approach to the fair report privilege that we consistently have applied in our previous jurisprudence, and continue to do in this case. See 1 R.D. Sack, Defamation § 7:3.5, at 7-33 & n.113 (5th ed. 2019).

restating the bus driver's allegations, the entry described how the police had responded to his complaint and the results of that police response. This response is what distinguishes the blotter entry in this case from a typical, unprivileged witness statement.

As we previously have noted, one private citizen's accusations against another are not privileged simply because they appear in a police record. *See Reilly*, 59 Mass. App. Ct. at 776-777. When the police take action on accusations, however, "every citizen should be able to satisfy himself with his own eyes as to the mode in which [that] public duty is performed." *See Cowley*, 137 Mass. at 394. Accordingly, a report of this official action is privileged.[19] Here, the UMass police department's discretionary decision to respond to and investigate the allegations against the plaintiff "imbue[d] [those] allegations with an official character." *See Howell*, 455 Mass. at 658 n.14. At that moment, the police response became an "official action[ ]" that fell within the fair report privilege. See id. at 658.

Once the privilege attaches, it extends not only to the police response, but to the underlying allegations as well. When official government action takes place, the public likewise has an interest in knowing the

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[19] This distinction is consistent with at least one code of journalistic ethics, which provides that a journalist should "[b]alance a suspect's right to a fair trial with the public's right to know," and "[c]onsider the implications of identifying criminal suspects before they face legal charges." Society of Professional Journalists, Code of Ethics, https://www.spj.org/pdf/spj-code-of-ethics.pdf [https://perma.cc/E2TA-BGZ5]. Although, as that code itself notes, these ethical guidelines are not legally enforceable, see id., they provide practical support for the line we draw.

circumstances giving rise to that action, including statements from police sources about the allegedly criminal activity that has produced a response. *See Jones*, 400 Mass. at 796-797; *Sibley v. Holyoke Transcript-Telegram Publ. Co.*, 391 Mass. 468, 468-469, 461 N.E.2d 823 (1984) (contents of affidavit attached to search warrant were privileged); *Thompson*, 285 Mass. at 346-347, 353 (applying privilege both to issuance of arrest warrant and underlying details). Without this context, it would be impossible for the public to assess the appropriateness of the government's response, and the public supervision rationale would be thwarted. *See, e.g.*, Cowley, 137 Mass. at 394.

In sum, once police undertake an official response to a complaint, both that response and the allegations that gave rise to it fall within the fair report privilege. Thus, here, both the report of the UMass police response and the allegations that triggered that response were privileged.

iv. Second publication. The second publication, as well, fell within the fair report privilege. That article included two related communications: a republication of relevant details from the police blotter, and a photograph of the plaintiff.[20]

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[20] Unlike the first publication, the second is "of and concerning" the plaintiff. See Hanson, 159 Mass. at 294. It is clear from the record that at least one third party, the plaintiff's supervisor, was able to identify him based on the photograph contained in the publication. Where a party is identifiable by a photograph, and that photograph is sufficiently tied to defamatory statements, those statements may be actionable by the identifiable party. See Brauer v. Globe Newspaper Co., 351 Mass. 53, 56-57, 217 N.E.2d 736 (1966). See also Stanton v. Metro Corp., 438 F.3d 119, 129 (1st Cir. 2006).

As with the first post, the republication of the blotter narrative was privileged as a report of official police actions. While it is not a perfect reproduction of the blotter post, it is substantively identical. The later post still attributes the contents of the article to UMass police. In so doing, the article carefully states that the police narrative is an "alleg[ation]" from a police source, and does not present it as the truth. Moreover, as with the first publication, the second reflects ongoing police action, *i.e.*, the search for an unknown man and the reasons underlying that action. Accordingly, because the article was limited to official actions, it was within the scope of the privilege.

For related reasons, we conclude that the photograph of the plaintiff also was privileged. Unlike the narrative, the photograph was never connected to the police blotter. Rather, it was included in the Mass Media publication, both in print and on the Internet, at the request of the UMass police, based on an inquiry from UMass administrators concerning the message from "Eric Jones" that they suspected was from a student. Some courts in other jurisdictions have held that, when police release the photograph of a suspect or arrestee to solicit the aid of the press, the republication of that photograph is privileged. *See Kenney v. Scripps Howard Broadcasting Co.*, 259 F.3d 922, 924 (8th Cir. 2001); *McDonald v. Raycom TV Broadcasting, Inc.*, 665 F. Supp. 2d 688, 691-692 (S.D. Miss. 2009); *Beyl v. Capper Publ., Inc.*, 180 Kan. 525, 528, 305 P.2d 817 (1957); *Martinez vs. WTVG, Inc.*, Ohio Ct. App., No. L-07-1269, 2008 Ohio App. LEXIS 1518, slip op. at ¶¶ 2, 31 (Apr. 11, 2008). Vishniac asks us similarly to conclude that the UMass police department's decision to

release the plaintiff's photograph was an official action covered by the fair report privilege.

In *ELM Med. Lab., Inc.*, 403 Mass. at 783, we recognized that "public health warnings issued by a governmental agency" fall within the fair report privilege. A year earlier, in *MiGi, Inc. v. Gannett Mass. Broadcasters, Inc.*, 25 Mass. App. Ct. 394, 396, 519 N.E.2d 283 (1988), the Appeals Court had reached the same conclusion concerning the Department of Public Health's release of a photograph of an allegedly defective child's toy. Each of these decisions rested on the precept that, when the government seeks to warn the public about a potential hazard, the press is privileged to offer fair and accurate reports of those warnings. Likewise, when the police reach out to local journalists and ask for their assistance in identifying an unknown person, they are performing an official act that falls under the fair report privilege.[21] Accordingly, the release of the photograph by Mass Media also was a privileged report of official action.

v. Fairness and accuracy. Although the reports at issue here thus fall within the scope of the fair report privilege, that does not foreclose liability. The privilege is not absolute; it can be lost if a plaintiff shows that the publisher acted with malice or that the report is not a "fair and accurate" portrayal of official actions or statements. *See Yohe*, 321 F.3d at 43. We consider fairness and accuracy as two separate but related elements. "A report is accurate if it 'conveys to the persons who read it a

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[21] Had the police released this photograph as part of an official press release, it also would have been privileged as an official statement. The record is not clear, however, on exactly how the police provided this photograph to Mass Media.

substantially correct account of the proceedings.'" *Howell*, 455 Mass. at 661, quoting Restatement (Second) of Torts § 611 comment f (1977). "It is fair so long as it is not 'edited and deleted as to misrepresent the proceeding and thus be misleading.'" *Howell, supra*, at 661-662, quoting Restatement (Second) of Torts, *supra*.

The fairness and accuracy of a report is a matter of law to be determined by a court "unless there is a basis for divergent views." *Howell*, 455 Mass. at 661. We review the attributed statements in the context of the entire publication, and the addition or reframing of information can remove otherwise fair and accurate statements from the privilege. *See Brown v. Hearst Corp.*, 54 F.3d 21, 25 (1st Cir. 1995).

There is little doubt that the first publication here was a fair and accurate report of the police blotter. To meet this standard, a publisher must show only the "factual correctness of the events reported," and not "the truth about the events that actually transpired." *Yohe*, 321 F.3d at 44. As noted *supra*, Mass Media's account was not only factually correct, it was a verbatim reproduction of the blotter without any commentary or framing by Mass Media. *Cf. Brown*, 54 F.3d at 25. This article was a fair and accurate report of police action.[22]

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[22] Of course, a report that begins as fair and accurate may not remain so as new information is released. This can prove particularly problematic in the case of online publications. A defamatory story posted online has both greater longevity and a greater potential to spread, resulting in ongoing injury. See Peltz, Fifteen Minutes of Infamy: Privileged Reporting and the Problem of Perpetual Reputational Harm, 34 Ohio N.U. L. Rev. 717, 719 (2008). In this case, however, the online version of the story was removed from the Mass Media Web site before any new information could render it misleading.

The second publication warrants closer scrutiny. We note three inaccuracies in the article.[23] It (1) identifies the source as a student, where the blotter is silent; (2) misstates that the subject was taking photographs on the UMass campus, instead of at the JFK Station; and (3) adds that the plaintiff took photographs of women "without their permission." Inaccuracies, however, "do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified'" (citation omitted). *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991). Here, the "sting" of the publication was that the plaintiff was seen suspiciously taking photographs of women. Neither the location of the activity nor the identity of the particular witness who reported it would enhance the defamatory effect of this report. The additional allegation that the plaintiff took photographs of women "without their permission" does have a greater potential impact on this defamatory sting. Nonetheless, because the blotter itself described the man's activity as suspicious, the inference that he was taking these photographs in a surreptitious manner was not unreasonable. This added detail did not transform the statements in the report or enhance its defamatory "sting." *ELM Med. Lab., Inc.*, 403 Mass. at 783. Instead, it "produce[d] the same effect on the mind of the recipient which the precise truth would have produced" (citation omitted). *Id.* The "rough-and-ready summary" of the report

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Because of both the initial fairness and accuracy of the publication, and the subsequent removal of the article from the online version, this publication was fully privileged.

[23] The plaintiff does not identify any inaccuracies regarding the photographs, and neither do we.

was sufficiently accurate, and these statements are not actionable. *See Yohe*, 321 F.3d at 44.

b. Intentional infliction of emotional distress. In addition to his claim of defamation, the plaintiff also maintains that Vishniac is liable for intentional infliction of emotional distress. To prevail on that claim, the plaintiff would have to show "(1) that the actor intended to inflict emotional distress or that [she] knew or should have known that emotional distress was the likely result of [her] 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.'" *Howell*, 455 Mass. at 672, quoting *Agis v. Howard Johnson Co.*, 371 Mass. 140, 144-145, 355 N.E.2d 315 (1976).

The plaintiff's claim of intentional infliction of emotional distress fails for the same reasons as does his claim of defamation. These claims are based on the same underlying conduct: the defendants' publications. The defendants' statements were privileged; such a privilege cannot be evaded simply by relabeling a deficient claim. *See Correllas v. Viveiros*, 410 Mass. 314, 324, 572 N.E.2d 7 (1991). Were it otherwise, a plaintiff could make an end-run around the First Amendment by camouflaging a defamation claim as a different tort. *Cf. Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988). Accordingly, we apply the fair report privilege to both actions. *See Yohe*, 321 F.3d at 44 ("a plaintiff cannot evade the protections of the fair report privilege merely by re-labeling his claim"). For this reason, both of the

plaintiff's claims fail as a matter of law. *See Howell*, 455 Mass. at 672.

Judgment affirmed.

APPENDIX B

APPEALS COURT OF MASSACHUSETTS

Jon Butcher,

v.

University of Massachusetts *et al.*[1]

April 11, 2018, Argued; September 17, 2018, Decided

No. 17-P-161.

Jon Butcher, pro se.

Jean M. Kelley for the defendants.

Present: MILKEY, MALDONADO, & WENDLANDT, JJ.

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 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

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[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

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, 782 N.E.2d 508 (2003). The allegedly defamatory publications 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 he 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

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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.

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 getting off 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 he 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 get off 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, because 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 that 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 commenced 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 counts[3] 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 motion of the remaining defendants[5] for

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[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, 5 N.E.3d 882 (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").

[5] Vishniac was the only remaining defendant with regard to the defamation claim; Vishniac, UMass, and the university defendants

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, 652 N.E.2d 603 (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 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-

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(except Day) were the remaining defendants with regard to the intentional infliction of emotional distress claim.

847, quoting *King v. Globe Newspaper Co.*, 400 Mass. 705, 708, 512 N.E.2d 241 (1987), cert. denied, 485 U.S. 940, 108 S. Ct. 1121, 99 L. Ed. 2d 281 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, 782 N.E.2d 535 (2003), quoting *Mulgrew v. Taunton*, 410 Mass. 631, 633, 574 N.E.2d 389 (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, 480 N.E.2d 1005 (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 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, 797 N.E.2d 1204 (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, 512 N.E.2d 260 (1987).

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[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.

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 governmental action" even where the facts underlying the official action are defamatory. *ELM Med. Lab., Inc. v. RKO Gen., Inc.*, 403 Mass. 779, 782, 532 N.E.2d 675 (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, 181 N.E. 249 (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

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

[8] *Contrast Thompson v. Boston Publ. Co.*, 285 Mass. 344, 346-347, 189 N.E. 210 (1934) (report of allegations on which plaintiff was arrested

Supreme 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 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

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after warrant was issued was privileged); *Sibley v. Holyoke Transcript-Telegram Publ. Co.*, 391 Mass. 468, 471, 461 N.E.2d 823 (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 crime, and broadcast of police chief's statements made during official press conference, both protected by privilege).

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, 626 N.E.2d 862 (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, 330 N.E.2d 161 (1975). When there is 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, 727 N.E.2d 1140 (2000), quoting *Markham v. Russell*, 94 Mass. 573, 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

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[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.

mental distress and made him fear for his safety and for that 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 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

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[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, 653 N.E.2d 161 (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]).

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

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. Howard Johnson Co.*, 371 Mass. 140, 144-145, 355 N.E.2d 315 (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, 681 N.E.2d 1189 (1997), quoting *Foley v. Polaroid Corp.*, 400 Mass. 82, 99, 508 N.E.2d 72 (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, 406 N.E.2d 675 (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

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[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, 694 N.E.2d 820 (1998), cert. denied, 525 U.S. 1177, 119 S. Ct. 1112, 143 L. Ed. 2d 108 (1999). *See also Robinson v. Commonwealth*, 32 Mass. App. Ct. 6, 9, 584 N.E.2d 636 (1992) ("[T]he University of Massachusetts is an agency of the 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*.

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, 793 N.E.2d 1256 (2003) (jury permitted to find extreme and outrageous conduct where defendant made multiple statements to his colleagues that plaintiff, who was fellow colleague, had engaged in anti-Semitic and homophobic behavior in 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.