SJC-12698

JON BUTCHER vs. UNIVERSITY OF MASSACHUSETTS & others.[1]

Suffolk. October 1, 2019. - December 31, 2019.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Newspaper. Libel and Slander. Emotional Distress. Privileged Communication.

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

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

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

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.

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

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 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]

1. Background. a. Facts. "We recite the facts in the light most favorable to the plaintiff." Ravnikar v. Bogojavlensky, 438 Mass. 627, 628 (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 Boston 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,

[2] We acknowledge the amicus brief submitted by Gatehouse Media, LLC, Associated Press, Reporter's Committee for Freedom of the Press, New England First Amendment Coalition, and Massachusetts Newspapers Publishers Association.

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 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,

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

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 read:

> "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."

On March 22, 2013, UMass police received photographs from the bus company that supposedly depicted the man who had been

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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.

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 read:

> "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 . . . ."

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

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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.

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 seen the newspaper articles. His workload was increased, and he was left out of critical

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

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 (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 (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 (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 (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 (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 (1995), quoting Symmons v. O'Keeffe, 419 Mass. 288, 293 (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 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 (1985). In the eyes of the law, "[t]ale-bearers are as bad as the tale-makers."[8]

[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).

i. Fair report privilege. In allowing the defendants' motion for 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 (1981). Recognizing the chilling effect this could have on media reporting, by the late Eighteenth Century[9] courts began to develop the fair report privilege as a "safety valve" for the press. See Howell v. Enterprise Publ. Co., LLC, 455 Mass. 641, 651 (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, 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 (1934) (issuance of warrant by clerk was

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

privileged); Kimball v. Post Publ. Co., 199 Mass. 248, 249-250, (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 (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 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 (1989), overruled on another ground by United Truck Leasing Corp. v. Geltman, 406 Mass. 811 (1990). Under the "now predominant" public

supervision rationale, Sack, supra, the fair report privilege is crafted to "promote[] our system of self-governance." 2 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

[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).

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 (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.

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

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[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 (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 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).

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 (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 so long as the report

[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.

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 (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.

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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 . . . ."

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 persons arrested." G. L. c. 41, § 98F. While G. L. c. 41, § 98F, makes all of 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 (2003). See

[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.

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, 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.

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[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 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."

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 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 (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 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 restating the bus driver's

[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 at 7-8, cert. denied, 558 U.S. 876 (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).

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.

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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.

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 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 (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]

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

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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 (1966). See also Stanton v. Metro Corp., 438 F.3d 119, 129, (1st Cir. 2006).

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 (1957); Martinez vs. WTVG, Inc., Ohio Ct. Appeals, No. L-07-1269, 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 (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 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 § 611 comment f, supra.

[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.

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. 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.

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 (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

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

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 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 (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 (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 (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.