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No. A11-1154

STATE OF MINNESOTA

IN SUPREME COURT

David McKee, M.D.,

Respondent,

vs.

Dennis K. Laurion,

Appellant.

**BRIEF OF
APPELLANT DENNIS K. LAURION**

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STATEMENT OF THE ISSUES

- I. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT SIX OF ELEVEN STATEMENTS PUBLISHED BY THE APPELLANT PRESENTED FACTUAL ISSUES OF TRUTH OR FALSITY FOR A JURY TO DETERMINE AND CONSTITUTED POTENTIAL HARM TO RESPONDENT'S REPUTATION IN THE COMMUNITY?

Answer: Yes. The Court of Appeals erred in determining that there were issues of fact as to whether six of eleven statements made by appellant were defamatory. The District Court properly determined that, whether viewing all of appellant's statements individually or as a whole, all eleven statements were not defamatory as a matter of law.

Apposite Authority:

Milkovich v. Lorain Journal Co. et al., 497 U.S. 1, 110 S.Ct. 2695 (1990)
Geraci v. Eckankar, 526 N.W.2d 391 (Minn. App. 1995)
McGrath v. TCF Bank Savings, 502 N.W.2d 801 (App. 1993)
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STATEMENT OF THE CASE

Appellant's father, Kenneth Laurion, is an elderly retiree who served honorably as a Navy medic in the Pacific during World War II. By the age of 19, he had achieved the rank of Second Class Petty Officer. After his service, he earned a Ph.D. and a Master's Degree in geriatric counseling. He worked as a high school teacher and, later, as a systems analyst at the dawn of the computer age. He served as a Boy Scout leader and an elder in his church.

On April 17, 2010, Kenneth Laurion suffered a hemorrhagic stroke. He was

rushed to St. Luke's Hospital where he was admitted to the Intensive Care Unit. Two days later, he was moved to a private room. He was joined there by his wife Lois, his son Dennis, and his daughter-in-law, Bonnie Laurion. Lois was terrified that her husband was going to die. The atmosphere in that room was charged with anxiety, fear and uncertainty. At a certain point, the respondent, Dr. McKee, entered the room, and encountered the Laurions. By his account, Dr. McKee introduced himself to the family by making a "jocular comment" to the effect that "I had looked for [Kenneth Laurion] up in the intensive care unit and was glad to find that, when he wasn't there, that he had been moved to a regular hospital bed, because you only go one of two ways when you leave the intensive care unit; you either have improved to the point where you are someplace like this or you leave because you've died." David McKee Deposition Transcript ("McKee Depo.") at 40. Under the circumstances, the Laurion family perceived this attempted jocular humor as untimely, inappropriate, and insensitive. During the balance of his time with them, Dr. McKee reinforced the family's impression that he was insensitive to their needs of the moment, those of Kenneth Laurion, but those of the others as well.

Later that week, appellant published his views on Dr. McKee's conduct through a letter to a representative of St. Luke's Hospital (and to other health care related agencies) and by posting comments on two "rate your doctor" websites.

The Complaint in this action asserts that eleven statements culled from appellant's written criticisms of the respondent's interaction with Kenneth Laurion and his family on April 19, 2010 were defamatory. Appellant moved for summary judgment, asserting that all eleven of the statements represented constitutionally protected opinion, were

substantially true as demonstrated by the respondent's own deposition testimony and writings, or were too imprecise to be defamatory. The District Court, Judge Eric Hylden, ruled that the statements, taken as a whole, represented appellant's protected opinion and, individually, were either opinion, substantially true, or too imprecise to be actionable. The Court of Appeals affirmed in part, reversed in part, and remanded, concluding that six of the statements (a) represented "factual assertions" capable of verification by a jury as true or false and (b) were capable of harming the doctor's reputation. The six statements at issue are:

- (1) "[Respondent] stated to [Kenneth Laurion] that he had to 'spend time finding out if you were transferred or died.'"
- (2) Respondent stated that "44% of hemorrhagic strokes die within 30 days. I guess this is the better option."
- (3) Respondent "told [Kenneth Laurion] that 'it doesn't matter' that the [hospital] gown was hanging from the neck, without any back."
- (4) Respondent "told [Kenneth Laurion] that 'you don't need therapy.'"
- (5) "[Respondent] strode out of the room without talking to [Kenneth Laurion's] wife or [Appellant]."
- (6) "[Appellant] subsequently stated that 'Dr. McKee is a real tool!'"

STATEMENT OF THE FACTS

Kenneth Laurion, appellant Dennis Laurion's father, suffered a stroke on April 17, 2010. (Dennis Laurion Deposition Transcript ("Laurion Depo.") at 34:12; Appellant's Appendix ("AA") at 55.) He was transferred to St. Luke's Hospital by ambulance and admitted to the Intensive Care Unit. (Laurion Depo. at 35-36; AA 55.) On April 19,

2010, he was moved to a private room. (Laurion Depo. at 37:21-22; AA 55.) Kenneth Laurion's family—his wife Lois, son Dennis, and daughter-in-law Bonnie—joined him soon after he was transferred out of the ICU. (AA 27, 55.)

Shortly thereafter, respondent Dr. David McKee arrived to conduct a neurological exam. Respondent had never before met any of the Laurions. (David McKee Deposition Transcript ("McKee Depo.") at 12:10-13.) The encounter between respondent and the Laurions lasted no more than 20 minutes. (McKee Depo. at 20:16-17.) Appellant was offended by the manner in which respondent conducted himself toward Kenneth Laurion during the examination. (*See, e.g.*, Laurion Depo at AA 27 – 29; 52 – 53; 56.)

On April 22, 2010, appellant wrote an email titled "patient care complaint" to St. Luke's Hospital, which was copied to other health-care related entities, regarding respondent's treatment of his father. (AA 26 – 29.) Appellant and his family were taken aback, not by respondent's *medical* treatment of Kenneth Laurion, but by what they saw as the brusque and insensitive manner in which respondent conducted himself toward Kenneth Laurion during the visit. (*Id.*; *see also* Laurion Depo at 52 – 53; 56.) Appellant described the events at issue as follows:

- Respondent asked Kenneth Laurion if he was Mr. Laurion. When Kenneth Laurion said yes, respondent said, "When you weren't in the ICU, I had to find out whether you had transferred or died."
- Respondent "sounded like he blamed my father for this loss of time. When my wife and mother and I gaped at the doctor, he told my father, 'Some stroke patients die before getting out of ICU; I guess this is the better option.' I was appalled! . . . My mother didn't need to be reminded that my father could have died."

- Respondent said “I have to do a neurology exam.” When Kenneth Laurion stated that therapists had been seeing him, and that he was used to their exams, respondent said, “Therapy? You don’t need that!”
- Respondent asked Kenneth Laurion if he could sit up and began lifting him up by his arms. When Kenneth Laurion was seated on the edge of the bed, respondent asked him to get out of bed and walk around. Kenneth Laurion’s gown hung from his neck, but his backside was exposed. Kenneth Laurion said, “I think I can walk, but this gown doesn’t cover my backside.” Respondent said, “That doesn’t matter,” and pulled Kenneth Laurion’s arms toward him. Bonnie Laurion asked respondent to wait a moment while Dennis, Bonnie, and Lois Laurion left the room to stand immediately outside the door.
- When respondent left the room, he glanced at the waiting family members and said, “You can go back in.” Respondent did not give the family a status update or ask any questions of the family. Respondent walked over to a nurse near a tub of patient charts and stood near her, scowling.
- Appellant subsequently mentioned his father’s experience to a nurse friend. She concluded that appellant was speaking of respondent and, when questioned, stated “He’s a tool!”

(AA 28.) After providing this description, appellant set out his purpose for the communication, stating “I think that all of your organizations should reinforce the need to see the patient as a person.” (*Id.*) Appellant felt that “Dr. McKee saw my father as a task and a charting assignment. He should have listened to him, he should have asked his wife some questions.” (*Id.*) Appellant proudly described his father’s accomplishments throughout a life of service to country, community, and family. (*Id.*) Appellant stated that “[a]t a time when my mother was terrified that her husband was about to die, I truly wish that Dr. McKee had taken the time to afford my father the dignity that he deserves.”

On or about April 22 and 23, appellant posted a shortened description of the encounter on two “doctor rating” websites, Insiderpages.com and Vitals.com.¹ (Laurion Depo. at 118:5-6; AA 32 - 34.) These postings contained the same statements set forth in the April 22 and 24 complaints, with only slight differences. (*Compare* AA 28 with AA 34 (“Enclosure 1”).) Rather than stating that respondent had said “Some stroke patients die before getting out of ICU; I guess this is the better option,” Appellant recalled respondent saying, “Well, 44% of hemorrhagic strokes die within 30 days. I guess this is the better option.” (*Id.*)

The record before the District Court and Court of Appeals reflected that respondent did make statements and conduct himself substantially in accordance with appellant’s recollection, although respondent disagreed with appellant’s interpretation of his words and demeanor. (*Compare* AA 28 with McKee Depo. at 26 – 34 and Exhs. 16 and 17.)

Respondent said he initially attempted to locate his patient, Kenneth Laurion, in the Intensive Care Unit and Kenneth Laurion was not there, so he went off to find him. (McKee Depo. at 16:9 – 17:5.) Respondent acknowledged that, in his experience, stroke patients and their families typically are anxious or upset, sometimes “extremely anxious.” (*Id.* at 10:18 – 11:7.) Respondent further acknowledged that stroke patients and their

¹ Appellant initially thought he posted to four websites. (AA 32 – 33.) When he went to remove his postings after receiving respondent’s threat letter, he found that he had posted to only two of the sites. (Laurion Depo. at 117 – 118.) Those sites removed appellant’s postings. (*Id.* at 180 – 81 and Exh. 12.) Whether appellant posted on two or four websites is of no consequence to this appeal, as appellant asked the District Court to assume his statements were published to third parties in analyzing whether the statements were defamatory.

families will look to him for clues as to what can be expected moving forward. (*Id.* at 11:8 – 13.)

When respondent entered the Kenneth Laurion’s hospital room on the evening of April 19, 2010, he recalled that he:

made a jocular comment meant to kind of relieve tension . . . to the effect of I had looked for him up in the intensive care unit and was glad to find that, when he wasn’t there, that he had been moved to a regular hospital bed, because you only go one of two ways when you leave the intensive care unit; you either have improved to the point where you’re someplace like this or you leave because you’ve died.

(*Id.* at 40:14 – 23.) Similarly, in his May 6, 2010 letter to Dr. Peterson, respondent stated that:

[w]hen I entered the room, I certainly wasn’t angry or annoyed but did make the comment that I had looked for him in the intensive care unit and was glad to see that he had been transferred from there to a regular hospital bed, as the two possibilities when one leaves the ICU are that you [have] improved . . . or . . . ha[ve] died. This was no[t] glib or morose

(*Id.* at Exh. 16, p. 1.) The Laurions were not amused by this “jocular comment,” and respondent’s statements only served to heighten a very tense and anxious time for the family. (AA 52 – 53; 56.)

Respondent confirmed there was an exchange between the parties involving the fastening of Kenneth Laurion’s hospital gown during the examination. In his May 6, 2010 letter to St. Luke’s, respondent stated that

when [Kenneth Laurion] was half-standing, half-sitting . . . [Respondent] . . . made the observation that the patient’s hospital gown was only tied at the neck. By the way that he

said this, I thought that his concern was that the gown might fall off but I could see the knot was well tied and told him that I thought it would be fine. It never crossed my mind that he was concerned about his father’s modesty with the back of the gown open

(McKee Depo. at Exh. 16, p. 1.) In his deposition, Dr. McKee stated that the gown “appeared good to me . . . like the gown wasn’t in any risk of falling off. And so I said, ‘It looks like it’s okay.’” (*Id.* at 44:14 – 16.)

Respondent also confirmed in his letter to St. Luke’s that a conversation related to the therapy Kenneth Laurion had already received took place during the visit. (*Id.* at Exh. 16, p. 1 (“I asked the patient if he had been out of bed that day and after hearing that the therapists had worked with him but had not gotten him out of bed, I asked if he felt up to that and if he wanted to try to stand and walk a little bit.”).)

The following chart compares appellant’s description of respondent’s statements and conduct with respondent’s own description:

<u>Dennis Laurion</u>	<u>David McKee</u>
<p>“When you weren’t in the ICU, I had to find out whether you had transferred or died.” (AA 28.)</p>	<p><u>Letter to St. Luke’s</u>: “[I] did make the comment that I had looked for [Kenneth Laurion] in the intensive care unit and was glad to see that he had been transferred from there to a regular hospital bed, as the two possibilities when one leaves the ICU are that you . . . ha[ve] improved . . . or . . . ha[ve] died.” (McKee Depo. at Exh. 16.)</p> <p><u>Deposition Testimony</u>: “I made a jocular comment . . . to the effect of I had looked for [Kenneth Laurion] up in the intensive care unit and was glad to find that, when he wasn’t there, that he had been moved to a regular hospital bed, because you only go</p>

	<p>one of two ways when you leave the intensive care unit; you either have improved to the point where you're someplace like this or you leave because you've died." (McKee Depo. at 40.)</p>
<p><u>Patient care complaint:</u> When my wife and mother and I gaped at [Respondent], he told my father, "Some stroke patients die before getting out of ICU; I guess this is the better option." (AA 28.)</p> <p><u>Online posting:</u> When we gaped at [Appellant], he said, "Well, 44% of hemorrhagic strokes die within 30 days. I guess this is the better option." (Laurion Depo at Exh. 1.)</p>	<p><u>Letter to St. Luke's:</u> "[T]he two possibilities when one leaves the ICU are that you . . . ha[ve] improved . . . or . . . ha[ve] died." (McKee Depo. at Exh. 16.)</p> <p><u>Deposition Testimony:</u> "[Y]ou only go one of two ways when you leave the intensive care unit; you either have improved to the point where you're someplace like this or you leave because you've died." (McKee Depo. at 40.)</p> <p><u>Deposition Testimony:</u> "I would have said it's probably somewhere between a third and half, probably closer to a third." (McKee Depo. at 102.)</p>
<p>My father's gown hung from his neck, but his back was exposed. He said, "[T]his gown doesn't cover my backside." Appellant said, "That doesn't matter." (AA 28.)</p>	<p><u>Deposition Testimony:</u> The gown "appeared good to me . . . like the gown wasn't in any risk of falling off. And so I said, 'It looks like it's okay.'"</p> <p><u>Letter to St. Luke's:</u> "[Respondent] . . . made the observation that the patient's hospital gown was only tied at the neck. By the way that he said this, I thought that his concern was that the gown might fall off but I could see the knot was well tied and told him that I thought it would be fine. It never crossed my mind that he was concerned about his father's modesty with the back of the gown open." (McKee Depo. at Exh. 16.)</p>

<p>When my father answered that a physical therapist and a speech therapist had seen him, and that he was used to being asked his date of birth, asked where he was, and asked to pull or push against the examiner's hands, Appellant said, "Therapy? You don't need that!" (AA 28.)</p>	<p>"I asked the patient if he had been out of bed that day and after hearing that the therapists had worked with him but had not gotten him out of bed, I asked if he felt up to that and if he wanted to try to stand and walk a little bit." (McKee Depo. at Exh. 16.)</p>
<p><u>Patient care complaint:</u> When Appellant left five minutes later, he glanced at us and said, "You can go back in." He didn't give us status or ask for family observations about my dad's mental or physical state. He walked to a nurse seated next to a tub of patient charts and stood near her, scowling. (AA 28.)</p> <p><u>Online posting:</u> Five minutes later, Dr. McKee strode out of the room. He did not talk to my mother or me. (Laurion Depo. at Exh. 1.)</p>	<p><u>Deposition Testimony:</u> After concluding the exam: "I left the patient's room and went to the nurse's station," which closed Dr. McKee's encounter with Kenneth Laurion, and was the last time Dr. McKee had any contact with the Laurions. (McKee Depo. 56:20 – 22; 58:20 – 60:3.)</p>

On May 3, 2010, respondent received a phone call from Gary Peterson, M.D., Medical Director at St. Luke's Hospital, concerning appellant's complaint. (McKee Depo. at Exh. 16.) Respondent answered by letter to Dr. Peterson on May 6, 2010. (*Id.*) In the letter, respondent acknowledged making statements substantially in accordance with appellant's recollection, although he disagreed with appellant's interpretation of his statements and demeanor. (*See id.*)

By letter to Dennis Laurion dated the next day, May 7, 2010, respondent, through counsel, claimed that appellant had defamed him. (Laurion Depo. at Exh. 6.) He stated he was prepared to pursue "appropriate legal action to protect and preserve his reputation." (*Id.*) Respondent stated that, before doing so, he "want[ed] to give you an

opportunity to correct th[e] matter” by (a) removing all web postings, and (b) discontinuing further communications. (*Id.*) The letter concluded with the following threat: “Please be mindful that [respondent] has the means and motivation to pursue all available recourse against you.” (*Id.*) At no point before sending this letter had respondent made any personal attempt to contact either Kenneth Laurion or appellant regarding appellant’s complaints, much less extend an apology for any offense given. (McKee Depo. at 80:22; 81:21.)

Appellant answered respondent’s threat letter via email on May 7, 2010. Appellant told respondent that he had no intention of posting anything more, and that he would consider the matter finished. (Laurion Depo. at Exh. 7.) Further, appellant requested removal of his online postings. (Laurion Depo. at p. 180 and Exh. 12.)

On May 14, 2010, appellant formalized his previously emailed complaint to the Board of Medical Practice using the Board’s preferred form. (Laurion Depo. at Exh. 14.) By Complaint dated four days later (May 18, 2010), respondent commenced this litigation against appellant. (AA 21.)

ARGUMENT

I. STANDARD OF REVIEW.

On appeal from summary judgment, a reviewing court determines whether there are genuine issues of material fact, and whether the lower courts erred in the application of the law. Minn. R. Civ. P. 56.03; *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). The reviewing court views the evidence in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn.

1993). “Even so, summary judgment is mandatory against a party who fails to establish an essential element of [the] claim, if that party has the burden of proof, because this failure renders all other facts immaterial.” *Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. App. 2001).

II. MINNESOTA STANDARDS FOR DEFAMATION.

Minnesota law has created a specific framework for determining whether a statement is defamatory. At issue are six statements made by appellant in relation to respondent’s treatment of appellant’s father. To establish that any of the six statements were capable of defamatory meaning, respondent must show that the statements were (1) false; (2) communicated to third parties; and (3) tended to harm respondent’s reputation and lower him in the estimation of the community. *Bebo*, 632 N.W.2d at 739.

Respondent “cannot succeed in meeting the burden of proving falsity by showing only that the statement[s are] not literally true in every detail. If the statement is true in substance, inaccuracies of expression or detail are immaterial.” *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986) (citing *Stuempges v. Parke Davis*, 297 N.W.2d 252, 255-56 (Minn. 1980)). “A statement is substantially accurate if its gist or sting is true, that is, if it produces the same effect on the mind of the recipient which the precise truth would have produced.” *Id.* Truth is a complete defense, and true statements, however disparaging, are not actionable. *Stuempges*, 297 N.W.2d at 255. A statement is capable of harming reputation where it exposes an individual “to public contempt or ridicule, and thus induc[ing] an ill opinion of him, and impair[ing] him in the good opinion and respect of others.” *Byram v. Aiken*, 65 Minn. 87, 87, 67

N.W. 807, 808 (1876).

Further, “expressions of opinion, rhetoric, and figurative language are generally not actionable if, in context, the audience would understand the statement is not a representation of fact.” *Jadwin*, 390 N.W.2d at 447. Whether a statement can be interpreted as stating actionable facts or can be proven false is a question of law for the court. *Geraci v. Eckankar*, 526 N.W.2d 391, 397 (Minn. App. 1995); *McGrath v. TCF Bank Sav.*, 502 N.W.2d 801, 808 (Minn. App. 1993)

As an example of the sort of utterances Minnesota courts have said *cannot* be reasonably interpreted as stating facts the statements, in *Geraci*, that the plaintiff “had poisoned the board,” was “out of control,” “a bad influence,” “emotional,” and “not a team player” were found not actionable because the statements did not contain facts or factual connotations that could be proven false. In *McGrath*, where bank managers called an employee a “troublemaker,” the court determined that the term was not actionable because it lacked precision and specificity, failed to suggest verifiable false facts about the plaintiff, was so ambiguous that it prevented any underlying facts from being inferred from the term, and was accordingly constitutionally protected. 502 N.W.2d at 808 n.4. Similarly, in *Bebo*, 632 N.W.2d at 740, the court found that the terms “a--hole” and “c---sucker” are pure vulgarity, have no basis in fact and are not defamatory as a matter of law. In *Lee v. Metropolitan Airport Com.*, 428 N.W.2d 815, 821 (Minn. Ct. App. 1988) the court held as a matter of law that the terms “fluffy”, “bitch” and “flirtatious” were too imprecise in nature to be actionable defamatory statements.

III. THE COURT OF APPEALS ERRED IN HOLDING THAT SIX OF ELEVEN STATEMENTS PUBLISHED BY THE APPELLANT PRESENTED FACTUAL ISSUES OF TRUTH OR FALSITY FOR A JURY TO DETERMINE AND CONSTITUTED POTENTIAL HARM TO RESPONDENT'S REPUTATION IN THE COMMUNITY.

The case before the Court is well defined and the record is clear on the issues in controversy. Fundamentally, the issues before the Court can be boiled down to three main points. First, when viewed individually, the statements published by appellant are either substantially true, lack specificity and/or are incapable of harming respondent's reputation. Second, the District Court was correct in holding that, when taken as a whole, appellant's published statements were protected opinion. Finally, appellant's letter to St. Luke's was a privileged communication sent with the intention of expressing a grievance related to patient care, an act supported and encouraged by Minnesota's Patient Bill of Rights. Each of these points is discussed below.

A. EACH OF THE SIX STATEMENTS MADE BY APPELLANT WERE EITHER SUBSTANTIALLY TRUE, TOO IMPRECISE TO BE DEFAMATORY OR DID NOT HAVE THE CAPACITY TO HARM RESPONDENT'S REPUTATION.

Taken individually, appellant's statements were either substantially true, too imprecise to be defamatory or did not have the capacity to harm respondent's reputation. Each of the six statements that the Court of Appeals held were actionable will be addressed individually below.

(1) "[Respondent] stated to [Kenneth Laurion] that he had to 'spend time finding out if you were transferred or died.'" and (2) Respondent stated that "44% of hemorrhagic strokes die within 30 days. I guess this is the better option."

As the Court of Appeals acknowledged, what appellant asserted respondent said

and what respondent recalled saying is similar. However, the Court of Appeals concluded that the gist or sting differed because, by his account, respondent intended to express happiness at Kenneth Laurion's survival. This is to mistake motive for perception. Either version was susceptible to being perceived as insensitive and inappropriate by persons in a tense and anxious situation such as the Laurions were in.

Appellant published his recollection that the doctor said, "When I couldn't find you in ICU, I had to find out if you were transferred or died." The doctor agrees that he made a substantially similar statement. But he claims he was only trying to make a "jocular comment . . . to the effect of I had looked for him up in the [ICU] and was glad to find that, when he wasn't there, that he had been moved to a regular hospital bed, because you only go one of two ways when you leave [ICU]; you either have improved . . . or . . . you've died."

The Court of Appeals noted the doctor's claim that he was trying to "express happiness" and held that, "[i]f the jury believes respondent, then the challenged statement is not substantially accurate," and thus potentially defamatory. But whether or not a jury believes the doctor wasn't trying to be insensitive cannot change the fact that the statement recalled by respondent was substantially the same as the statement published by appellant. Respondent's subjective intent cannot operate to change what he said or alter appellant's perception of what was said and how it was said.

Likewise, respondent argues that he did not use 44% when making the second portion of this statement. In his deposition, respondent noted that the figure is actually "probably closer to a third." (McKee Depo. at 102). As the District Court correctly

recognized, appellant's version of what was said is substantially true by reference to respondent's own deposition testimony and prior writings. (App. Add. 4 – 5, 14; *see also* McKee Depo. at 100 - 101 and Exhs. 16 – 17.). As with the ICU statement, the Court of Appeals concluded that there is a fact issue if a jury believes respondent did not *intend* to have his comment perceived in a negative manner. Respondent's subjective intent, however, does not raise a fact issue where the statement recalled by appellant is substantially true and accurately reflects the essence of respondent's statement.

Accordingly, it was error for the Court of Appeals to hold that there is a factual question as to the truth or falsity of these statements based upon the subjective intent of respondent in making them.

(3) Respondent “told [Kenneth Laurion] that ‘it doesn’t matter’ that the [hospital] gown was hanging from the neck, without any back.”

This statement is substantially true by respondent's own admission. (McKee Depo. at 44:14 – 16 and Exh. 16, p. 1.) Kenneth Laurion had just been moved from the ICU. His wife, son and daughter-in-law were in the room when respondent began his examination by asking Kenneth Laurion to stand up. Kenneth Laurion, concerned over his modesty, informed respondent that the gown he was wearing did not cover his back side. Respondent dismissed these concerns. Whether respondent stated “That doesn't matter” or “It looks like it's okay” is immaterial. The fundamental gist of either statement is that respondent was not sensitive to Kenneth Laurion's concerns for his modesty.

Simply because it “never crossed [respondent's] mind that [appellant] was

concerned about his father's modesty with the back of the gown open" does not make Laurion's comment on respondent's insensitivity defamatory. (McKee Depo at Ex. 16.) The Court of Appeal's conclusion that there is an issue of fact regarding the subjective intent of respondent in making the statement, does not make appellant's stated impression of the statement defamatory.

(4) Respondent "told [Kenneth Laurion] that 'you don't need therapy.'"

Respondent acknowledged that a conversation related to the therapy appellant's father had received took place. (McKee Depo. at Exh. 16, p. 1.). After the conversation, appellant and his family were left with the impression that respondent did not think Kenneth Laurion needed therapy.

As published, this statement is too ambiguous and lacking in context to be capable of lowering respondent's reputation. The statement does not suggest that respondent had reached an incorrect medical conclusion. As the District Court noted, a medical professional might well hold that a patient does not need therapy as a valid medical opinion. (AA 14.). Seen in context, the published statement may convey something of appellant's sense of the respondent's brusque approach to his father, but the statement itself is far from sufficient to expose respondent to "public contempt or ridicule."

Additionally, this statement is too imprecise and lacking in specificity to be deemed defamatory. Kenneth Laurion was in the hospital. He clearly needed, and was receiving medical care.

(5) “[Respondent] strode out of the room without talking to [Kenneth Laurion’s] wife or [Appellant].”

The Court of Appeals held that there is a factual issue as to whether respondent said anything to appellant and his family when he left Kenneth Laurion’s hospital room. The Court of Appeals held that this statement suggests that respondent is uncaring and as such, is capable of harming his reputation.

Whether or not respondent told the family they could “go back in” is irrelevant, because the gist and sting of this statement is true by respondent’s testimony. (McKee Depo. 56:20 – 22; 58:20 – 60:3.) Respondent did not stop to chat, provide a bit of reassurance, a tincture of hope, or report to the family regarding Kenneth Laurion’s condition upon leaving the room. (McKee Depo. at 56 – 59.) The Laurions were on the floor waiting for the examination to finish. (AA 28.)

Further, this statement is too imprecise and lacking in specificity to be deemed defamatory or to have any adverse impact on respondent’s reputation in the community. A listener or reader of this statement is left with nothing but speculation—did respondent leave the room without speaking to family members intentionally, did respondent even see family members outside the room, did waiting family members attempt to speak with respondent or ask him to stop, was respondent simply distracted by a subsequent matter to attend to? A statement so lacking in context or objective facts that cannot be proven one way or another is too imprecise to be deemed defamatory, does not tend to lower respondent’s reputation within a community, and cannot provide a basis for a defamation claim.

(6) “[Appellant] subsequently stated that ‘Dr. McKee is a real tool!’”

The Court of Appeals held that there was a question of fact as to whether this statement was actually made and that the statement had the capacity to harm respondent’s reputation. Regardless of the veracity of this statement, however, the phrase “real tool” lacks precision and specificity and like the terms “troublemaker”, “c---sucker”, “a—hole”, “fluffy” and “bitch” cannot be defamatory.

The decision of the Court of Appeals in relation to the phrase “real tool” permits the possibility of the imposition of liability for words of expression, rhetoric, and figurative language that repeated United States Supreme Court and Minnesota decisions have found to be too vague and imprecise to be defamatory. *See, e.g., Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20, 110 S. Ct. 2695, 2706 (1990) (protecting statements that cannot be reasonably interpreted as stating actual facts about an individual); *Jadwin v. The Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986) (expressions of opinion, rhetoric, and figurative language generally non-actionable); *McGrath v. TCF Bank Sav.*, 502 N.W.2d 801, 808 (Minn. App. 1993) (calling plaintiff a “troublemaker” is non-actionable for lack of specificity and failure to suggest any verifiable false facts); *Bebo v. Delander*, 632 N.W.2d 732, 740 (Minn. Ct. App. 2001), (the terms “a--hole” and “c---sucker” are pure vulgarity, have no basis in fact and are not defamatory as a matter of law); *Lee v. Metropolitan Airport Com.*, 428 N.W.2d 815, 821 (Minn. Ct. App. 1988)(the terms “fluffy”, “bitch” or “flirtatious” are too imprecise in nature to be actionable defamatory statements).

The Court of Appeals draws an artificial distinction based upon whether appellant or appellant's nurse friend stated, "Dr. McKee is a real tool," suggesting that the statement is somehow defamatory if made by a nurse. The distinction has no legal significance. The focus must be on the word itself, not if or by whom the word was uttered. The Court of Appeals acknowledged that neither the court nor the parties could define the precise meaning of the term. Calling someone "a real tool" is a definitive example of an utterance lacking specificity or verifiable false facts about the subject, and calling a doctor "a real tool" is clearly incapable of suggesting anything about his professional capabilities. Indeed, the term "tool" is significantly milder than the terms "a—hole", "c---sucker", "fluffy" or "bitch", all which Minnesota courts have held are not defamatory as a matter of law as their meaning is too imprecise.

B. ONLINE REVIEWS CONSTITUTE OPINION WHICH IS PROTECTED UNDER THE FIRST AMENDMENT.

Taken as a whole, appellant's statements constitute protected opinion under the first amendment of the Constitution. When the respondent first encountered appellant and his family, the atmosphere in Kenneth Laurion's hospital room was tense and anxious. Respondent, rather than comforting and communicating with appellant and his family, made "jocular" comments about Kenneth Laurion's options as an ICU patient that were not well received and, in appellant's view, acted insensitively to his father while appellant was in the room. To express his opinion about respondent's bedside manner, appellant wrote to a representative of St. Luke's Hospital and posted comments on two "rate your doctor" websites.

Appellant is entitled to voice his opinion in relation to respondent's conduct. *Jadwin*, 390 N.W.2d at 447. In cases appropriately governed by constitutional law principles, the Supreme Court has found statements not actionable in defamation if they fall into the categories of hyperbole or personal expression, i.e., statements that cannot reasonably be interpreted as stating actual facts about a person. *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695 (U.S. 1990). Taken as a whole, appellant's comments reflect his subjective impression of respondent's demeanor and conduct toward his father. Appellant's statements paint a picture of appellant's subjective view of respondent's bedside manner and should be interpreted as the personal expression of appellant rather than a factual statement about respondent. The District Court correctly held that, in that context, appellant's statements were protected opinion.

The context in which people view ratings websites is also critical. The very nature of online forums, such as review websites, inherently frames comments in the context of expression of individual opinion and not as fact. The allegedly defamatory statements made by appellant are significantly tamer than the language contained in the average Amazon.com product review. When individuals peruse ratings websites, they are aware that what they are reviewing are commenters' subjective personal expressions. On any given product or service, there are likely good reviews, average reviews and negative reviews. The average person viewing such a site is able to parse through various opinions and come to his/her own conclusion.

Minnesota courts have not addressed defamation as it relates to online reviews of services, products or professionals. Courts in numerous other jurisdictions, however,

have addressed the issue of defamation and free speech rights in cyberspace in the context of review of products and services and have almost unanimously upheld the fundamental right of the individual to express opinions online.

In *Barna Log Homes of Ga., Inc. v. Wischmann*, 310 Ga. App. 844 (Ga. Ct. App. 2011), an individual posted a review to the website of a log home manufacturer which stated in relevant part “[n]o problem with Barna directly, but the distributor, Barna Log Homes of GA, was grossly overcharging for the materials and did a poor job on the engineering overview and window specifications.” *Id.* at 845. The log home manufacturer brought suit alleging that the review constituted actionable defamation. *Id.* at 844. The Court found in favor of the reviewer, holding that the individual's statements that the corporation was grossly overcharging and did a poor job on the engineering overview and window specifications were his opinions of those matters based on his experience working with the corporation. *Id.* at 847-848.

In *Field v. Grant*, 30 Misc. 3d 1217A (N.Y. Sup. Ct. 2010), an attorney's former client posted unflattering comments relating to his representation on several ratings websites. The comments included the following:

Gary P. Field Fool Attorney who practices Fraud . . . Gary Field a/k/a 'the Walking Fool' is the most worst attorney licensed to practice in the State of New York . . . , Overall, he is dumb . . . I hired Gary P. Field and he screwed up my divorce. Residence [sic] of Suffolk County have a right to expect that a witness/lawyer who testified before the Supreme Court will tell the truth. The court system cannot function if witnesses/lawyers are not held accountable for false statements made under oath. If a witness makes a choice to ignore his obligation to testify honestly there must be consequences.

Id. The attorney brought suit against his former client alleging that the online postings were defamatory. *Id.* The Court held that despite the unflattering nature of the reviews:

[T]he complained of comments purportedly posted by the defendant on the identified web pages are not actionable as they constitute mere opinions of the writer. Viewed in the context in which they were relayed and the website forums on which they were posted, the comments constitute pure opinions which cast general reflections upon the plaintiff's character and/or qualities which are not a matter of such significance and importance so as to amount to actionable defamation. . .

Id. See also *Penn Warranty Corp. v. DiGiovanni*, 10 Misc. 3d 998 (N.Y. Sup. Ct. 2005)(individual who designed “gripe site” alleging that company participated in deceptive business practices was expressing opinion and was not liable for defamation); *Guerrero v. Carva*, 10 A.D.3d 105, 779 N.Y.S.2d 12, 17 (1st Dep't 2004) (recognizing constitutional protection for statements of opinion in context of internet product reviews); *Hammer v. Trendl*, 2002 U.S. Dist. LEXIS 25487 (E.D.N.Y. Oct. 10, 2002) (author failed to demonstrate a likelihood of success on the merits on his defamation claims because the online reviews of his book were expressions of opinion).

In *Horizon Group Management, L.L.C. v. Bonnen*, 2009L008675 (Circ. Ct. Cook County, Ill., filed July 20, 2009), a tenant composed the following Tweet: “@JessB123 You should just come anyway. Who said sleeping in a moldy apartment was bad for you? Horizon realty(sic) thinks it's ok.” The landlord sued the tenant under a theory of libel *per se*, claiming that the alleged defamatory statement damaged its business reputation. *Id.* The tenant filed a motion to dismiss, claiming that the “statement was made in a

social context where the average reader would understand that the statement was [the tenant's] opinion, not an objectively verifiable fact.” *Id.* The tenant’s motion to dismiss was granted on the basis that her tweet was protected opinion.

The *Grant* court succinctly framed the issue when it held that “[v]iewed in the context in which they were relayed and the website forums on which they were posted, the comments constitute pure opinions. . .” This is the context in which appellant’s comments were published. Readers of web rating sites expect to see opinions in the form of debate, disagreement and back and forth commentary. Given these expectations, on the part of both readers and contributors, readers are unlikely to see such postings as factual.

Under the framework suggested by the Court of Appeals, a dissatisfied diner could be sued for defamation after leaving a two star review on the internet complaining that “my food was cold and the service was incompetent.” Publishing one’s opinion on the internet should be treated no differently than water cooler exchanges in determining whether a statement is defamatory. Whether a statement is published to three people or three million, the analysis remains the same. The District Court was correct - there has to be some breathing space for what most people see as the personal expression of subjective views.

C. APPELLANT’S LETTER TO ST. LUKE’S IS SUBJECT TO A QUALIFIED PRIVILEGE AND IS SUPPORTED BY MINNESOTA’S HEALTHCARE BILL OF RIGHTS.

Appellant’s letter to St. Luke’s is not only subject to a qualified privilege, but is also fully compatible with the legislative policy of the State of Minnesota as outlined in

Minnesota's Health Care Bill of Rights.

“One who makes a defamatory statement will not be held liable if the statement is published under circumstances that make it qualifiedly privileged and if the privilege is not abused.” *Bol v. Cole*, 561 N.W.2d 143, 149 (Minn. 1997). Qualified privilege applies when a court determines that statements made in particular contexts or on certain occasions should be encouraged despite the risk that the statements might be defamatory. *Id.* For a defamatory statement to be protected by such a privilege, it must be made in good faith and must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. *Id.*

Appellant's letter to St. Luke's was sent in good faith with the stated motive of informing St. Luke's of appellant's concerns over the care his father received after spending days in the ICU recovering from a hemorrhagic stroke. The letter to St. Luke's was sent in the hope that future patients would not undergo the indignities appellant perceived that his father had endured. Accordingly, considering the obvious tenor and purpose of appellant's statements regarding respondent's treatment of his father, all of the statements were qualifiedly privileged.

Minnesota's Health Care Bill of Rights encourages patients, guardians, or other interested persons, i.e., family members, to voice grievances—to anyone they deem appropriate—when patients are not treated with courtesy and respect. Minn. Stat. § 144.651, subds. 1, 5, 19, and 20. The legislature, in expressing its intent behind the statute stated that:

It is the intent of the legislature and the purpose of this section to promote the interests and well being of the patients and residents of health care facilities. . . . Any guardian or conservator of a patient or resident or, in the absence of a guardian or conservator, an interested person, may seek enforcement of these rights on behalf of a patient or resident.

Id. at subd. 1. Appellant was frustrated with what in his opinion was respondent's insensitive treatment of his father in front of his anxious and concerned family. Appellant voiced his frustrations by writing a letter to St. Luke's, which he copied to other health care organizations, and by publishing his views on the internet. Appellant's letter is the kind of grievance that Minn. Stat. § 144.651 is meant to protect. The Health Care Bill of Rights specifically encourages individuals such as appellant to voice their concerns over patient care. Appellant was doing this and nothing more.

CONCLUSION

For the foregoing reasons, appellant Dennis Laurion respectfully requests that this Court reverse the Court of Appeal's decision regarding the six statements in issue and remand the case to the District Court for reinstatement of its judgment in favor of the appellant.

Dated this 24 day of April, 2012.

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Appellant.

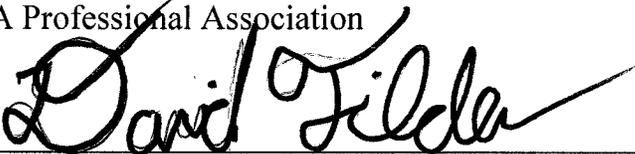
**CERTIFICATION OF
BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1, and Minn. R. Civ. App. P. 131.01, subd. 5(d)(7)(B), for a brief produced with proportional font. The length of this brief is 8,337 words. This brief was prepared using Word. The word processing program has been applied specifically to include all text, including headings, footnotes and quotations.

Dated this 24 day of April, 2012.

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