

No. A11-1154

STATE OF MINNESOTA

IN SUPREME COURT

David McKee, M.D.,

Respondent,

vs.

Dennis K. Laurion,

Appellant.

REPLY BRIEF OF
APPELLANT DENNIS K. LAURION

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ARGUMENT

I. THE SIX STATEMENTS AT ISSUE ARE SUBSTANTIALLY TRUE, TOO IMPRECISE TO BE DEFAMATORY OR ARE NOT CAPABLE OF HARMING RESPONDENT'S PROFESSIONAL REPUTATION.

Rather than addressing the substantive arguments raised by appellant in his brief, respondent spends the majority of his brief attempting to portray Mr. Laurion as a vindictive and spiteful man with the avowed goal of destroying Dr. Mckee's professional reputation and injuring his standing in the medical community. Respondent asserts that each of six statements made by appellant constitutes an accusation of "aberrant" behavior which implies that respondent endangered and purportedly degraded his own patients. While it is entirely possible that such eccentric characterizations of the events at issue represent respondent's own subjective view of Mr. Laurion's actions, the simple facts of the case do not support his assertions. Appellant's statements, taken at face value, simply reflect the reactions of a concerned son who was offended at what he perceived as respondent's insensitive conduct and statements while he was seeing his father.

In his brief, respondent takes the position that each of the six statements left standing after the Court of Appeal's decision were a.) false and b.) defamatory as a matter of law. Taken individually, however, appellant's statements were either substantially true, too imprecise to be defamatory or did not have the capacity to harm respondent's reputation and thus, were not defamatory.

As discussed in appellant's initial brief, the statements published by appellant are substantially true by respondent's own admission. Respondent's blanket denial of the

truth of the statements made by appellant rings hollow in the light of respondent's deposition testimony. Although the parties disagree about minor differences, such as the inclusion of percentages or the use of a word here or a word there, the deposition testimony of *both* appellant and respondent shows that statements virtually identical to those published by appellant were made by respondent while he was evaluating appellant's father. For example, appellant published the statement "When you weren't in the ICU, I had to find out whether you had transferred or died." AA 28. In his deposition, respondent concedes that he stated:

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 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.)

The chart contained in appellant's initial brief illustrates that the statements published by appellant and the statements respondent admits to making are functionally identical. Statements which are substantially true, by carrying the same gist, are not defamatory. *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986). The record shows that the statements made by appellant are substantially similar to the statements made by respondent and are not defamatory.

Likewise, respondent fails to rebut the argument that several of the statements are too imprecise to be defamatory. Statements such as "you don't need therapy" or he "strode out of the room without talking" are so vague and lacking in context or meaning

that they cannot be deemed defamatory under Minnesota law.

Respondent also argues that each of the six statements tends to harm his professional reputation. Respondent argues that appellant's statements paint a picture of an "aberrant" physician endangering the lives of his patients as a result of his purposeful patient mismanagement. On their face, appellant's statements paint no such picture. At worst, appellant's statements constitute a critique of what he perceived as Dr. McKee's poor bedside manner. None of the statements accused Dr. McKee of being a poor physician or providing appellant's father with improper medical treatment. Such vague statements made in the course of treating appellant's father are not concrete enough to harm respondent's reputation in the community and are not defamatory.

Finally, respondent once again raises the specters of the alleged "phantom nurse" and the much debated term "real tool." Respondent alleges that the existence of the nurse, and whether she uttered the phrase "real tool", constitute fact questions which should go to the jury. Whether the statement is attributable to appellant himself, a nurse or someone else is ultimately irrelevant. The distinction of who made the statement has no legal significance and does not create a factual question for the jury. The focus must be on the word itself, not if or by whom the word was uttered. As discussed in great detail in appellant's previous submission, words much more offensive than "real tool" such as "a---hole", "c---sucker", "fluffy" or "bitch" are not defamatory as a matter of law in Minnesota as their meaning is too imprecise. Likewise, the word "real tool," by whomever uttered, is not defamatory as a matter of law.

II. TAKEN AS A WHOLE, THE SIX STATEMENTS ARE PROTECTED OPINION.

The District Court was correct when it held that appellant's statements, taken as a whole, are protected opinion and therefore not defamatory. Conversely, respondent argues that appellant's statements cannot be construed as opinion as they constitute verifiable fact.

The Supreme Court has found statements not actionable in defamation if they fall into the categories of hyperbole or personal expression. *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695 (U.S. 1990). When viewed as a whole, appellant's comments reflect his subjective impression of respondent's demeanor and conduct toward his father.

Appellant's statements represent a personal view of respondent's bedside manner and should be interpreted as the personal expression of appellant rather than a factual statement about respondent.

Context is also critical. The vast majority of the dispute between the parties centers upon statements published by appellant on several doctor rating websites. As was noted in the well-reasoned decision in *Field v. Grant*, 30 Misc. 3d 1217A (N.Y. Sup. Ct. 2010):

[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. . .

That is, online review websites contain a spectrum of good, bad and mixed opinions on various services or products.

Many reviews contained on doctor rating websites are not laudatory. The sentiments expressed in those reviews, however, are personal opinion based upon the reviewer's subjective impression of his or her time with the physician. Generally, mixed in with these critical reviews are contrary opinions praising the physician as a capable and compassionate medical care provider. Review websites are online marketplaces of opinion, where viewpoints can be traded freely. Because of the broad spectrum of sentiments, however, these sites must be taken with a grain of salt.

Under the framework proposed by respondent, if a patient left a review stating that the "doctor did not listen to a word I said," the review could be deemed defamatory if the doctor could show that she actually did listen to at least "a" word said by this patient. Holding that appellant's statements are not protected could subject individuals who were merely exercising their right of personal expression online to defamation lawsuits. The District Court was right - there has to be some breathing space for what most people see as the personal expression of subjective views. As such, the District Court was correct in holding that, when viewed as a whole, appellant's statements are protected opinion.

III. THE ISSUE OF PRIVILEGE AND THE HEALTHCARE BILL OF RIGHTS IS PROPERLY BEFORE THE COURT.

Respondent asserts that appellant's arguments regarding the Health Care Bill of Rights fall outside of the scope of appellate review. Respondent further argues that even if the Health Care Bill of Rights provided appellant with a privilege, appellant's allegedly "wanton" conduct defeated any immunity he may have had. Both of these arguments are without merit.

The issue of whether appellant's statements were privileged under Minnesota's Patient Health Care Bill of Rights is properly before this Court. Minn. R. Civ. App. P. 110.01 provides that the "papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." The comments following the Rule note that the "original trial court record is the official and only record on appeal." *Id.* at 1967 Adv. Comm. Note. Appellant's Memorandum in Support of Motion for Summary Judgment dealt extensively with the issue of privilege as well as the Health Care Bill of Rights. AA 12-15. Appellant again raised the issue of the Health Care Bill of Rights, without objection from respondent, in his submission to the Court of Appeals. Appellant's memorandum is part of the trial court record and is within the scope of allowable appellate review.

In order for a privilege to be defeated, it must be shown that a party "made a statement from ill will and improper motives, or causelessly and wantonly for the purpose of injuring the plaintiff." *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980). Although respondent attempts to frame appellant as vindictive, there is no evidence to support this assertion. As discussed, *supra*, both parties agree on the general content of the statements made by respondent and later published by appellant. Although there is some bickering over wording and the inclusion of a percentage, these disputes do not alter the central fact that the statements are substantially similar.

There is no evidence, aside from respondent's unsupported conjecture, that appellant published the statements with "ill will." Rather, the content of the letter to the hospital, the online reviews and appellant's deposition testimony make it clear that

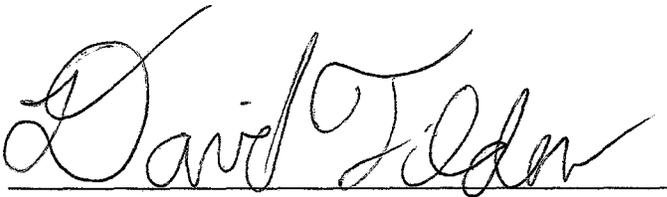
appellant's statements were published because he was upset at what he perceived as respondent's insensitive treatment of his father. He wanted respondent, and other physicians, to remember that their patients are people with feelings and to treat them accordingly. There is no evidence that appellant published the statements with malicious intent toward respondent. Absent such evidence, appellant is entitled to a privilege for the statements he published.

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 15th day of June, 2012.

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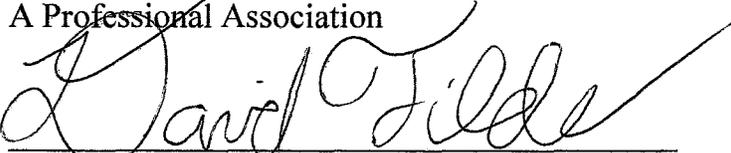
**CERTIFICATION OF
BRIEF LENGTH**

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 2,118 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 15th day of June, 2012.

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