

NO. A11-1154

State of Minnesota
In Supreme Court

DAVID MCKEE, M.D.,

Respondent,

v.

DENNIS LAURION,

Appellant.

RESPONDENT'S BRIEF, ADDENDUM AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF ISSUES

1. *Did the Court of Appeals correctly reverse Summary Judgment on grounds that six specific statements are actionable as libel?*

How Issue Was Raised Below: The issue was raised in the Trial Court in opposing Summary Judgment and on appeal before the Court of Appeals.

Ruling Below: The Trial Court granted Appellant's Motion for Summary Judgment dismissing the action, which the Court of Appeals reversed.

How Issue Was Preserved for Appeal: The issue was briefed and argued in the Trial Court in the Memorandum in Opposition to Motion for Summary Judgment, and in briefs and oral argument before the Court of Appeals.

Apposite cases:

Melina v. Chaplin, 327 N.W.2d 19 (Minn. 1982);

Morey v. Barnes, 212 Minn. 153, 2 N.W.2d 829 (1942);

Jadwin v. Star & Tribune Co., 390 N.W.2d 437 (Minn. Ct. App. 1986); and

Entravision Commc'ns Corp. v. Belalcazar, 99 S.W.3d 393 (Tex. App. 2003).

* * * * *

2. *Does a qualified privilege from defamation exist under the Health Care Bill of Rights for the statements?*

How Issue Was Raised Below: The issue was raised in the Trial Court, but not in the Court of Appeals.

Ruling Below: The issue was not ruled upon by the Trial Court and was not raised in the Court of Appeals.

How Issue Was Preserved for Appeal: It was not. The issue was not raised in Appellant's Petition for Review.

Apposite Cases:

City of West St. Paul v. Kregel, 768 N.W.2d 352 (Minn. 2009);

Crossroads Church of Prior Lake Minn. v. County of Dakota, 800 N.W.2d 608 (Minn. 2011);

Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991);

Minn. Stat. § 144.651;

Minn. Stat. § 147.121;

Minn. Stat. § 145.63.

STATEMENT OF THE CASE

This case was brought by a Duluth doctor against the son of a patient he briefly treated after a stroke in April, 2010. Dr. David McKee, a neurologist, was accused by Dennis Laurion in multiple public internet postings and in numerous emails and letters to his professional peers and organizations, of aberrant behavior and improper treatment that endangered the patient. Dr. McKee sued Laurion for Defamation and Interference with Business in St. Louis County District Court.

The Trial Court granted Summary Judgment on grounds that some of the statements made by Laurion were opinions, that the gist or sting of some of the statements was true, that some were too vague to have a defamatory meaning, and others left “nothing for the jury to decide.” Resp. App. 13-18. The Trial Court also dismissed the Interference claim.

Dr. McKee appealed to the Court of Appeals, which reviewed and remanded, holding that six particular statements were actionable as defamation. Resp. Add. 13. It reasoned that a trier-of-fact could find them to be libelous and award damages to Dr. McKee. It also upheld dismissal of the Interference claim. Resp. Add. 14.

Laurion’s Petition for Review as to the defamation claim was granted by this Court, to determine whether any of the six specific statements could be defamatory. No other issues have been raised by the parties.

STATEMENT OF THE FACTS

A. The Parties

Dr. McKee is a highly-regarded neurologist who has been practicing medicine for 18 years in Duluth and the surrounding community. He is a member of a medical clinic and has hospital privileges at St. Luke's Hospital, among other places. AA-446; Resp. App. 49-50¹.

Defendant Laurion's father was briefly attended to by Dr. McKee when he was a patient at St. Luke's Hospital, while recovering from a hemorrhagic stroke in April, 2010.

B. The April 19th Incident

The elder Laurion suffered a stroke and was hospitalized in St. Luke's Intensive Care Unit (ICU) over the weekend of April 17-18, 2010. After two days in ICU, he was moved to another unit around dinner time on Monday, April 19th.

Defendant Laurion, along with his wife and mother, came to visit his father, about the time of the father's transfer. Dr. McKee, who had been asked by the patient's primary physician to assess him, came into the room a short while later. AA-447, 448. Dr. McKee conducted a routine neurological examination, consistent with normal medical practices, which took about 20 minutes. AA-448, 449, 454-458. After the

¹ "AA-_____" refers to Laurion's Appendix. "Resp. Add. _____" is the Addendum to Dr. McKee's brief. "Resp. App. _____" refers to the Appendix hereto. "Tr. _____" refers to the Transcript of the hearing on the Motion for Summary Judgment.

examination, he discussed with the patient his assessment of his medical condition and ongoing medical care, and asked if the patient had any questions. AA-458.

What happened during the exam is hotly disputed and forms the basis for this lawsuit. The parties present two starkly different factual accounts. Dr. McKee maintains that nothing exceptional occurred. Laurion portrays a markedly different encounter, describing what he terms a “factual recitation” of events in which Dr. McKee treated his father and the family improperly. AA-022, 308, 314, 316-17, 353, 355.

The patient was released from the hospital the next day, April 21, 2010. The following day, April 22, 2010, Laurion maintains that he was at a post office in Duluth when he ran into a woman he described as a “friend” who worked as a nurse at another Duluth hospital where Laurion himself had once worked for about seven years. According to Laurion, he recounted his father’s treatment to the “friend,” who “guessed” that the physician was Dr. McKee, whom she described to Laurion as a “real tool,” a derogatory phrase that Laurion later published on the internet and in correspondence to others. Laurion later acknowledged that he should not have used that remark in his subsequent Internet postings and other communications. AA-317-18, 350.

There are *three* versions of what occurred with Laurion’s supposed nurse “friend.” Laurion testified that the nurse “friend” guessed that he was referring to Dr. McKee but that he did not confirm it. AA-318. But in an internet posting, Laurion says that he affirmatively “mentioned Dr. McKee’s name” to the nurse. AA-358, 359, 360, 441. Laurion’s wife, to whom he described the incident, says that Laurion admitted **confirming** to the “friend” that the attending physician was Dr. McKee. Resp. App. 47.

At any rate, Laurion used the derogatory statement of the purported nurse “friend” in his website postings and in his multiple letters.

This “friend” has never been named or identified by Laurion. There is strong reason to believe she is fictitious. Despite investigative efforts on behalf of Dr. McKee, she could not be found. Resp. App. 3-5. Even the Trial Court, in dismissing the case, questioned whether the nurse “friend” really exists or was fabricated by Laurion. In his Memorandum, the Judge noted that Laurion has been “unable to even provide a very good description of her [the nurse], much less a name or other identifying information.” Resp. App. 6.

C. The Defamatory Diatribes

Laurion, a former Boy Scout, did not do a good deed when he engaged in defamation against Dr. McKee. Two days after the ex-boy scout’s supposed encounter with the phantom “nurse,” he posted vitriolic accounts about Dr. McKee, which Laurion described as “factual recitations,” on multiple internet web sites, including: (1) www.vitals.com; (2) www.drscore.com; (3) www.insiderpages.com; and (4) www.healthgrades.com. AA-32-33, AA-326-328. Each of these websites contains evaluative information about physicians (and others) and is available to the general public via the internet. AA-327, 358-360. Laurion followed up these postings with letters to a dozen (or more) entities, including peer organizations in the medical profession,

containing a substantially similar “factual recitation.” AA-339, 400-423.² These entities include: American Academy of Neurology; American Neurology Association; Attending Physician Craig Gilbertson, M.D.; Lake Superior Medical Society; Minnesota Medical Association; Minnesota Quality Improvement Organization; Office of Quality Monitoring of the Joint Commission of the American Hospital Organization; the Patient’s Action Network of the American Medical Association; St. Louis County Public Health and Human Services Advisory Council; St. Luke’s Hospital Patient Advocates; Minnesota Department of Health; Office of the Medicare Ombudsman; and the American Board of Psychiatry & Neurology, Inc. AA-396, 400-423.

Laurion acknowledges making at least two general postings, perhaps more, on April 22, 2010.³ These undisputed postings were made on the Insiderpages.com website, which contains profiles about individuals, and Vitals.com, which has biographical information about individuals in the medical profession, such as Dr. McKee. AA-327.

The internet postings were nearly identical. They stated:

² Laurion and his wife also sent separate complaints to the Minnesota Board of Medical Practice, but none of the claims in this case extends to communications to that body or any other government licensing entity. The claims refer only to website postings and communications made to nongovernmental entities and physician peers. Laurion asserts he did not write, but only proofread his wife’s complaint. AA-355. His wife says he wrote it. Resp. App. 46. While not germane to the defamation claim, this intra-spousal discrepancy further reflects Laurion’s lack of veracity.

³ Laurion maintains that he managed to post his “factual recitation” on only two websites, insiderpages.com and vitals.com, and was unable to access the other two. AA-325. But prior to this lawsuit, in a letter to McKee’s attorney, he said he posted on **four** web sites. AA-32-33. He now retracts that assertion that he posted only on two sites. *Appellant’s Brief*, p. 6, n. 1.

My father spent 2 days in ICU after a hemorrhagic stroke. He saw a speech therapist and physical therapist for evaluation. About 10 minutes after my father transferred from ICU to a ward room, Dr. David C. McKee walked into a family visit with my dad. He seemed upset that my father had been moved. Never having met my father or his family, Dr. McKee said, "When you weren't in ICU, I had to spend time finding out if you transferred or died." When we gaped at him, he said, "Well, 44% of hemorrhagic strokes die within 30 days. I guess this is the better option." My father mentioned that he'd been seen by a physical therapist and speech therapist for evaluation. Dr. McKee said, "Therapists? You don't need therapy." He pulled my father to a sitting position and asked him to get out of bed and walk. When my father said his gown was just hanging from his neck without a back, Dr. McKee said, "That doesn't matter." My wife said, "It matters to us; let us go into the hall." Five minutes later, Dr. McKee strode out of the room. He did not talk to my mother or me. When I mentioned Dr. McKee's name to a friend who is a nurse, she said, "Dr. McKee is a real tool!"

AA-358-59. (AA-360 is very similar.)

Similar statements, with some embellishments and more inconsistencies, were embodied in the longer diatribes he sent to the dozen or more professional organizations and peer agencies. AA-400-423.

Laurion described his diatribes in the internet postings and the letters including the precise quotations ascribed to Dr. McKee as "an accurate account of what happened" during Dr. McKee's examination of his father. AA-326. His avowed purpose of the postings and correspondence was to degrade Dr. McKee in the eyes of others, including fellow physicians and patients. He made his internet postings and wrote his letters after he was upset at seeing Dr. McKee's good reputation on other websites, and his goal was to debase those views. He hubristically proclaimed that he hoped "someone would say [to Dr. McKee], 'You should be very careful how you address your patients so that we don't get these complaint letters.'" AA-337.

The following features are undisputed in this case:

(1) Laurion's statements constitute a "*factual recitation ... concerning Dr. McKee's conduct*" as alleged by Laurion. Laurion characterized his remarks this way in his Answer and twice in his deposition. AA-317, 355. He also describes his statements as "an accurate account of what happened." AA-326.

(2) Laurion's remarks are very specific, including explicit verbatim quotations ascribed to Dr. McKee and, in the concluding line, the phantom nurse "friend."

(3) Nearly all of the assertions are disputed by Dr. McKee, who claims that the portrayal is false and the incidents did not occur as asserted in Laurion's "factual recitation."

(4) Several of the remarks in the internet postings and letters are palpably false and fabricated; ascribing to Dr. McKee a statement about the statistical rate of mortality of those in the patient's condition; asserting that the physician stalked out of the treatment room without talking to the family; and quoting the "phantom," apparently non-existent, "nurse" making a pejorative remark about Dr. McKee.

(5) All of the statements were published to third parties, indeed to the world at large. Laurion acknowledges that the statements were "actually ... posted" on the two internet sites and were published to

third parties, and that the website publications were available to anyone in the world with a computer. AA-327.

(6) People actually viewed the website postings, reacted to it, and informed others about it. AA-449-50.

(7) Laurion's deprecatory and pejorative statements were for the express purpose of portraying the episode involving Dr. McKee in a negative light to the world at large. AA-326-27, 337, 350.

D. McKee's Mitigation

Dr. McKee became aware of the internet postings when a patient saw one and called it to his attention. He then checked them out himself. AA-449-50. He also learned of Laurion's libelous letters to various professional organizations and peer groups. AA-449-50.

The doctor tried to mitigate the harm by sending a cease-and-desist letter to Laurion. AA-393-94. Laurion responded by identifying four websites on which he placed the postings (not the two he later claimed in the lawsuit), as well as dozens of entities to whom he sent the deprecatory letters. AA-395-96. Laurion stated he would try to remove the website postings, that he was "no longer inclined to discuss Dr. McKee's behavior with anybody," and would "consider this matter finished." AA-395-397.

Despite his professed desire to put the matter behind him, Laurion proceeded full throttle forward. While he claims to have removed the items from the internet, a number still lurk there despite efforts by Dr. McKee to have them removed. AA-459. A couple

of days after he claimed the matter was “finished,” Laurion contacted two Duluth television stations and the *Duluth News Tribune* newspaper, to try to pitch the story about the dispute about McKee’s treatment of his father. The Duluth newspaper subsequently did write a story about this lawsuit, which was then circulated on the internet. AA-355.

E. The Libel Lawsuit

Aware that Laurion was intent on further disseminating the defamation, Dr. McKee brought this lawsuit. The claim of defamation *per se* is based on the Internet website postings and the communications to various private medical organizations.

F. Proceedings Below

1. The Trial Court Dismissal

After the parties exchanged written discovery and depositions were taken of Laurion, his wife, and Dr. McKee, Laurion brought a Motion for Dismissal on the Pleadings under Minn. R. Civ. P. 12 and for Summary Judgment under Minn. R. Civ. P. 56, which the Trial Court considered as a Motion for Summary Judgment under Rule 56 because he relied on matters outside the pleadings in the Motion. *See* Minn. R. Civ. P. 12.03.

The Trial Court granted Laurion’s Motion, and judgment was entered dismissing the case. Although Laurion harshly accused Dr. McKee of improper and unsafe practices, the Trial Court, in its Memorandum, benignly characterized Laurion’s internet postings and letters as Laurion’s expression of “Dr. McKee’s insensitive treatment of his father.” Resp. App. 2. It proceeds erroneously to observe that “overall the parties agree

on the substance of how things went” during the examination, Resp. App. 3, even though they *disagree* on almost everything that Laurion alleges occurred.

Noting that the internet postings and letters must be viewed “as a whole,” Resp. App. 9, the Trial Court below examined each individual comment separately. Resp. App. 13-18. It found that the “gist or sting” of some of the statements were true, that others were opinion, that one was too vague to be defamatory, and that “[t]here is simply nothing for a jury to decide here.” Resp. App. 14-18. In so doing, it did not address at all one of the most heinous statements: that Dr. McKee endangered the physical safety of the patient.

Despite Laurion’s acknowledgment that his internet postings and letters were “factual recitation(s),” the Trial Court viewed them as subjective emotional expressions. It concluded that “[t]aken as a whole, the statements in this case appear to be nothing more or less than one man’s description of shock at the way he and in particular his father were treated by a physician.” Resp. App. 12. Rather than accept Dr. McKee’s assertions of falsity, as required on a motion for summary judgment, the Trial Court saw “a common thread tying together both sides of this story.” Resp. App. 12. The Trial Court also dismissed the Interference with Business claim, without any findings or discussion, and that issue has not been appealed here.

2. *The Court of Appeals Reversed*

The Appellate Court, in reversing, viewed the matter much differently than did the Trial Judge. It held that a half-dozen of the statements made by Laurion on his web site

postings and parallel correspondence, all of which the doctor denies, constituted actionable defamation: (1) that the doctor said he had to “spend time finding out if you were transferred or died”; (2) that the Doctor stated that “44% of hemorrhagic strokes die within 30 days. I guess this is the better option”; (3) that the Doctor told the patient “You don’t need therapy”; (4) that the doctor said that “‘it doesn’t matter’ that the patient’s hospital gown did not cover his backside”; (5) that the Doctor left the patient’s room without talking to the family; and (6) that a nurse referred to the Doctor “a real tool.” Resp. Add. 13.

All of the statements were deemed by the Court of Appeals to be factual statements that could be found to be false and defamatory by the trier-of-fact. Therefore, the case was remanded for trial. This Court then accepted review of the Court of Appeals’ decision.

SUMMARY OF ARGUMENT

The Court of Appeals correctly determined that the lawsuit should not have been dismissed on Summary Judgment.

This case presents two starkly different portrayals of the facts concerning Dr. McKee’s treatment of Laurion’s father. Laurion made explicit, abrasive, negative statements about how Dr. McKee examined his father, the patient, which Dr. McKee largely disputes. The six controverted statements made by Laurion are defamatory. They were very specific observations, including verbatim quotations, casting Dr. McKee in a negative light and harmful to his reputation. They were published to the public at large

on the internet, as well as to Dr. McKee's peers throughout the medical profession. Laurion did so for the avowed purpose of harming Dr. McKee's reputation, which he accomplished, and deterring patients from seeking Dr. McKee's services. They constitute defamation *per se* because they impugn the Doctor's professional capabilities and qualities.

The Appellate Court was right in viewing Laurion's remarks as objective, factual statements which Laurion characterized as a "factual recitation" and an "accurate account of what happened." AA-22, 326. Dr. McKee contests nearly all of the "factual recitation" and maintains that the encounter did not happen as recounted by Laurion.

The summary judgment standard requires that these factual disputes be resolved in favor of Dr. McKee, the non-moving party. Under this criteria a trier of fact must determine whether the disputed statements are truthful, as Laurion contends, or false, as Dr. McKee asserts, whether they tend to harm the doctor's reputation, and the amount of Dr. McKee's damages.

STANDARD OF REVIEW

This Court reviews dismissal on Summary Judgment *de novo*. *Savela v. City of Duluth*, 806 N.W.2d 793, 796 (Minn. 2011).

Summary judgment is a "blunt" instrument that should be used only in limited circumstances where it is "clearly applicable." *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008); *Katzner v. Kelleher Constr.*, 535 N.W.2d 825, 828 (Minn. Ct. App. 1995). Summary judgment may be granted only when there are no

genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03; *J.E.B. v. Danks*, 785 N.W.2d 741, 748 (Minn. 2010). All doubts must be resolved in favor of Dr. McKee, the non-moving party. *J.E.B.*, 785 N.W.2d at 751. “The moving party has the burden of showing an absence of factual issues” *Anderson v. State Dept. of Natural Res.*, 693 N.W.2d 181, 191 (Minn. 2005). “The nonmoving party must provide evidence on which a jury could reasonably find in that party’s favor on each element of the claim.” *White v. Many Rivers W. Ltd. P’ship*, 797 N.W.2d, 743 (Minn. Ct. App. 2011).

Because there are genuine issues of material fact at issue here, the Court of Appeals properly reversed and remanded as to the six defamatory statements.

ARGUMENT

I. LAURIONS’ STATEMENTS ARE LIBELOUS

A. The Defamation Standard

Defamation consists of a false statement of fact made to third parties that harm the reputation of the subject of the statements. *See Geraci v. Eckankar*, 526 N.W.2d 391, 397 (Minn. Ct. App. 1995); *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919-20 (Minn. 2009); *see also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17-18 (1990). The first step is for the Court to determine, as a threshold matter, whether the statements are reasonably capable of having a defamatory meaning. *Utecht v. Shopko Dept. Store*, 324 N.W.2d 652, 653 (Minn. 1982). If so, it is then up to the jury, as the trier of fact, to decide if they are indeed defamatory. *Id.* at 654. *See also Schlieman v. Gannett Minn.*

Broad., Inc., 637 N.W.2d 297, 307 (Minn. Ct. App. 2001) (stating that the jury retains the ultimately responsibility for determining whether statements are defamatory). The Court of Appeals properly determined that the six specific statements are capable of being defamatory.

One category of defamation is libel *per se*, which consists of statements that impugn a person in his profession or occupation. *Bahr*, 766 N.W.2d at 920; *Longbehn v. Schoenrock*, 727 N.W.2d 153, 158 (Minn. Ct. App. 2007). When statements are defamatory *per se*, as they are here, the claimant may recover compensatory damages without proof of actual harm since damages are *presumed* in such cases. *Bahr*, 766 N.W.2d at 920; *Longbehn*, 727 N.W.2d at 160.

This case basically is one of credibility. Laurion provides a “factual recitation” of his version of what occurred when Dr. McKee examined his father. Dr. McKee paints a vastly different picture. This case is quintessentially not susceptible to summary disposition because credibility is so crucial to the outcome. The trier of fact, the jury, must make this determination. See *Powell v. Anderson*, 660 N.W.2d 107, 122 (Minn. 2003) (stating that the district court is “not authorized to make credibility determinations” on summary judgment); *Howie v. Thomas*, 514 N.W.2d 822, 825 (Minn. Ct. App. 1994) (noting that the test for summary judgment requires the district court and the reviewing court to “assume the credibility of the opposing party’s evidence”); *Tsudek v. Target Stores, Inc.*, 414 N.W.2d 466, 469 (Minn. Ct. App. 1987) (“Weighing conflicting testimony and determining witness credibility is within the province of the jury.”).

B. Laurion’s “Factual Recitation” Is Actionable

1. The Statements Are Inherently Harmful

The pervasiveness of internet websites, where Laurion made multiple postings of his “factual recitation,” makes aspersions published on it particularly harmful. By reaching everyone, all of the time, they become a permanent, indelible stain. *See Yath v. Fairview Clinics, N.P.*, 767 N.W.2d 34, 43 (Minn. Ct. App. 2009) (noting, in a privacy case, “Internet communication is materially similar in nature to a newspaper publication or a radio broadcast because upon release it is available to the public at large.”); *N. Am. Recycling, LLC v. Texamet Recycling, LLC*, No. 2:08-cv-00579, 2010 WL 4806733, *3 (S.D. Ohio Nov. 17, 2010) (unpublished) (magistrate judge, in a report and recommendation, retorting, “To make matters worse, many of these defamatory statements have been posted on the internet”). Resp. App. 83. *See also* Clay Calvert & Robert D. Richards, *Defending the First in the Ninth: Judge Alex Kozinski and the Freedoms of Speech and Press*, 23 Loy. L.A. Ent. L. Rev. 259, 276 (2003) (“[A blogger] can get an audience of 10,000 overnight – much more than a lot of small town newspapers.”).

Laurion hit his main target because the postings were seen in Duluth. AA-449-50. But he did not confine his handiwork to the internet; he sent similar, even more pointed assertions to a dozen or more organizations and colleagues of Dr. McKee, motivated by Laurion’s professed desire to harm the doctor’s reputation. AA-400-23.

The statements made by Laurion satisfy the standards for actionable defamation, libel in this case. *See LeDoux v. Nw. Publ’g., Inc.*, 521 N.W.2d 59, 68 (Minn. Ct. App.

1994) (“Because the news article implied improper conduct by LeDoux, a jury reasonably could conclude that the articles harmed LeDoux’s reputation.”).

There is no dispute that they were communicated or published to third parties – the world at large for the internet postings, as well as the dozen or so letters targeted to professional organizations, peers, and colleagues of Dr. McKee. Nor is there – or should there be – any dispute as to the inherently harmful character of these communications.

These letters and, more ominously, the internet postings, are not equivalent to a “water cooler exchange[,]” as Laurion pleads. *Appellant’s Brief*, p. 24. They were not one-on-one chats about personal likes or dislikes, but were aimed at harming the McKee’s reputation by dissemination to the world at large. Nor are they like restaurant reviews, reports with personal opinions of taste. *Id.*, pp. 23-24. They constituted factual statements of events that did not occur or Laurion fabricated. Expressing an opinion that the food at a restaurant was bad or the service poor is not actionable, but stating that particular food was not tasty would be actionable if that food was never served. Similarly, saying that a particular wait person made specific quoted statements when they did not, would be actionable. So would making up a non-existent diner, like the phantom nurse, who berates the facility. That is essentially what Laurion did to Dr. McKee. He fabricated statements, events, and even a person that never happened or existed. Laurion’s restaurant review analogy, therefore, cannot be swallowed.

When reviewing a defamation claim on summary judgment, the “individual statements must be looked at as a whole.” *Jadwin v. Minneapolis Star & Tribune Co.*, 390 N.W.2d 437, 443 (Minn. Ct. App. 1986) (emphasis added) (“The defamatory

character of any particular statement must be *construed* in the *context* of the article *as a whole.*"); *Schlieman*, 637 N.W.2d at 304 (“[C]ourts must interpret the defamatory-meaning element of a defamation action in light of the context surrounding the alleged defamatory statements”). Viewing the statements in this context, as a whole, they are defamatory. The totality of the statements, which are presumed false for summary judgment purposes, reflects inappropriate behavior on the part of a physician and improper treatment of a patient. These accusations are indicative of faulty medical practices that an outside expert describes as “harmful to the doctor-patient relationship and could impede proper medical treatment.” Resp. App. 26.

Laurion’s innocuous description of his aspersions mischaracterizes their gravity. He asserts that his internet postings and corresponding letters did not question Dr. McKee’s “medical treatment,” but only the physician’s “brusque and insensitive manner.” *Appellant’s Brief*, p. 4. But his diatribes are much more severe. The way a physician interacts with a patient is part of the medical treatment. The statements here relate to medical care and advice supposedly furnished by Dr. McKee (such as “You don’t need therapy.”) These statements are not simply deviations from politeness, but go to the heart of medical care and treatment decisions.

Likewise, a physician’s so-called “bedside manner” is part of the “medical treatment” since it affects how the patient receives and responds to the care given by the physician. Resp. App. 20, 26-28. *See also* Resp. App. 23-30; Helen Riess, *Empathy in Medicine—A Neurobiological Perspective*, J. Am. Med. Ass’n, Oct. 13, 2010, at 1604, 1605 (emphasizing the importance of physician empathy on the quality of medical care,

stating, “empathy is an important component of clinical competence, without which there can be serious consequences”), Resp. App. 102; Anand K. Parekh, *Winning Their Trust*, N.E. J. Med., June 1, 2011, at e51(1), e51(2) (explaining the importance of bedside manner to medical care and patient outcomes), Resp. App. 104; *see also Fuste v. Riverside Healthcare Ass’n, Inc.*, 575 S.E.2d 858, 861-62 (Va. 2003) (internal citations omitted) (finding that statements that physicians had “‘abandoned’ their patients and that there were ‘concerns about their competence’ not only prejudice the doctors in the practice of their profession, but also contain ‘a provably false factual connotation’” (citation omitted)).

Rather than attacking Dr. McKee’s incivility, Laurion offers a “factual recitation” to the world at large and Dr. McKee’s peers, too, of the doctor’s alleged inappropriate, improper and hazardous medical practices toward the patient and his family. These statements attack the professional qualities of Dr. McKee and necessarily harm his reputation in the eyes of others, including other medical referral sources and potential future patients. Resp. App. 28-29.

Dr. Harry Farb, a veteran doctor with substantial experience in the Duluth medical community, pointed out to the Trial Court:

“The *totality of statements* made on these websites would be injurious to the reputation and standing of a doctor in the eyes of others who might see it, including patients or prospective patients, colleagues, peers, referral sources, and others. These statements are made as factual reporting of eyewitness observations by Defendant Laurion and normal readers would draw negative impressions of Dr. McKee from these statements and lower his esteem in their eyes. It is inherent that such statements would tend to impugn the doctor’s professional capabilities and *diminish his reputation in the eyes of others*. Current or prospective

patients, who read such comments or hear about them, could have a natural tendency to want to avoid him as a doctor because of his supposedly bad attitude and treatment. Peers and colleagues could tend to look down upon him as a result of these comments. Other doctors could be less likely to refer patients to him because of concern that the patients would be dissatisfied with his treatments, which would diminish the likelihood of referrals from other physicians. *Both of these tendencies, fewer patients and less referrals also could have a severe economic impact on Dr. McKee's medical practice and his career.*"

Resp. App. 27-28 (emphasis added).

Dr. Farb, with no connection to the parties, observes that the internet postings have a natural tendency to harm Dr. McKee in his professional capacity and career by dissuading current and prospective patients from treating with him and deterring other physicians from referring patients to him. Resp. App. 27-30.

The same is true of the correspondence sent by Laurion to Dr. McKee's professional colleagues. As Dr. Farb explains:

The statements made in various correspondence to non-governmental and non-licensing authorities contain[ing] the same "factual" account would have the same negative, deprecatory effect and it would be inherently harmful to Dr. McKee's reputation in the eyes of others. Statements of this kind made to organizations and institutions in the medical profession would cause them to lower their regard for Dr. McKee because they are indicative of poor medical practice, improper doctor-patient relationship, and could impair the proper functioning of that relationship.

Resp. App. 28-29.

Dr. Farb's expert views conform to the reality of Dr. McKee's medical practice. As Dr. McKee explains, a major source of his practice (and revenue) consists of referrals from other physicians. Professional colleagues are likely to see these statements on the website or learn about them through other professional peers. As Dr. McKee states:

[F]or a neurologist, at least in my practice ... my customers, if you will, is not so much the patients as their referring doctors. . . . [O]ur flow of patients depends on the reputation I have among these other physicians.

AA-462.

Prospective patients who view the websites naturally would be deterred from utilizing his services, too. Resp. App. 27-29; AA-461-62. As expert Farb opined, the internet postings are expected to have a “very detrimental effect” on McKee’s professional reputation with a “potential negative impact on his livelihood due to fewer referrals and fewer patients.” Resp. App. 30. A study, introduced below, reflects that some 78% of consumers rely on material on websites on the internet in making decisions on goods and services. Resp. App. 40.

The Court of Appeals was mindful of the negative impact these statements could have on the doctor’s reputation and professional standing. They variously portray him as “insensitive to the feelings, fears, and modesty concerns of the patient and his family,” Resp. Add. 12; reflect that he was “arrogant and careless” in his medical treatment. Resp. Add. 12; suggest that the doctor is “too busy or uncaring” to communicate with the patient’s family “in a time of crisis,” Resp. Add. 13; and, the statement ascribed to the phantom nurse (who may be fabricated) reflects “disapproval of another medical professional [that] is capable of harming [Dr. McKee’s] reputation as a doctor.” Resp. Add. 13.

2. *The Statements Must Be Viewed "As A Whole"*

Courts in other jurisdictions have taken the required broad view of communications to determine their defamatory nature. In *Baylor v. Comprehensive Pain Mgmt. Ctr., Inc.*, No. 7:09cv00472, 2011 WL 1327396, at *1-2 (W.D. Va. Apr. 6, 2011) (unpublished), Resp. App. 51-52, a doctor and member of the Army Reserves was fired by the private practice clinic where he worked after returning from active duty. He sued for defamation after the clinic made "a host of derogatory statements to patients after his termination, such as telling his patients that he had left, that his whereabouts were unknown, that he was let go for ethical reasons and that his integrity was not high." *Id.* Resp. App. 52.

Denying summary judgment, the court noted that "[a] defamatory statement may be made 'by inference, implication or insinuation.'" *Id.* at *7 (quoting *Carwile v. Richmond Newspapers*, 82 S.E. 2d 588, 592 (Vir. 1954)). Resp. App. 57. Statements may rise to the level of defamation "by imputing an unfitness to perform job duties or a lack of integrity in the performance of duties" which "are actionable as defamation *per se.*" *Id.* at *7. Resp. App. 57. The court explained "[i]n considering whether a statement is one of fact or opinion, a court must consider the statement as a whole; it may not isolate parts of an alleged defamatory statement from another portion of the statement." *Id.* at *8. Resp. App. 58. Citing to a leading treatise on defamation, the court, in allowing the doctor's defamation claim to proceed, explained:

Defendants can be held liable for defamation "when a negative characterization of a person is coupled with a clear but false implication that the author is privy to facts about the person that are unknown to the

general reader.” The test for determining whether facts that may be actionable defamation have been implied is “whether a reasonable listener would take [the speaker] to be basing his ‘opinion’ on knowledge of facts of the sort than can be evaluated in a defamation suit.”

Id. at *11 (alteration in original) (citing Robert D. Sack, *Sack on Defamation: Libel, Slander, and Related Problems* § 4:3.2 (4th ed. 2010)). Resp. App. 60-61. See also *Condit v. Nat’l Enquirer, Inc.*, 248 F. Supp. 2d 945, 968 (E.D. Cal. 2002) (tabloid report that the wife of a congressman whose intern was missing, had a “furious phone call” with the intern before her disappearance, which the wife denied, “could falsely convey to the reader that Plaintiff is an intemperate hothead who engaged in a screamfest on a long distance phone call with a person she did not know, when prudence dictated terminating that call and not ‘losing her temper,’” [and] “[s]uch conduct could cause others to have contempt for, to ridicule, shun or avoid Plaintiff, making the statements reasonably susceptible to a defamatory meaning”).

Summary judgment also was denied for another physician’s claim of defamation against a television station in *Entravision Commc’ns. Corp. v. Belalcazar*, 99 S.W.3d 393, 400 (Tex. App. 2003). The court there, as in *Baylor*, looked to the entirety of the offensive piece, even though each individual segment *in isolation* may be non-actionable. The TV report portrayed the physician as having committed malpractice without mentioning he had been dismissed from the malpractice lawsuit. Affirming denial of summary judgment, the court explained:

Because a reasonable person’s interpretation is on the entirety of a publication, even though each individual statement considered alone might be literally true, we cannot conclude that the broadcast at issue did not convey a defamatory meaning when it juxtaposed [the physician’s] office

and name with the report that a doctor left gauze in [the patient's] abdomen, and yet did not mention [the physician's] dismissal.

Id. at 398.

As in *Baylor* and *Entravision*, the Court of Appeals looked at Laurion's offensive statements as a whole in concluding that the statements were defamatory, not whether each individual remark is actionable, in isolation.

a. Had to “spend time finding out if you were transferred or died.”

Laurion's assertion that Dr. McKee said to his father when meeting him “I had to spend time finding out if you were transferred or died” is defamatory. As the Court of Appeals concluded, this statement, which Dr. McKee denies making, reflects “that he is rude, insensitive, and morbid,” since it casts him as “insensitive to the feelings, fears, and modesty concerns of the patient and his family.” Resp. Add. 12. It portrays him in a way that other patients and professionals who refer cases to him would tend to shun, which constitutes a triable defamation. *See Ritter v. United States Fid. & Guar. Co.*, 573 F.2d 539, 542 (8th Cir. 1978) (defining defamatory statement as “one which tends to hold the plaintiff up to hatred, contempt or ridicule, and to cause him to be shunned or avoided” (quoting W. Prosser, *The Law of Torts* 739 (4th ed. 1971))).

b. “44% of hemorrhagic strokes die within 30 days”

Laurion also makes the “factual” assertion that Dr. McKee told the patient and family members that “44% of hemorrhagic strokes die within 30 days,” which Dr. McKee denies occurred. AA-358-60. Even other members of the Laurion clan, present during the examination, are unsure if the doctor actually made such a statement.

Laurion maintains Dr. McKee said “44%,” while his wife and mother recall reference to some type of ratio but do not recall any specific percentage. AA-330, Resp. App. 45. But Dr. McKee denies making this statement at all and supports his denial by noting that this figure is something he has not ever heard previously. AA-468-469.

The real explanation lies elsewhere. An entry in *Wikipedia* about strokes reports a mortality rate of 44% within 30 days. AA-329-330, 367. Laurion consulted this source *after* Dr. McKee examined his father. AA-329-330. The Trial Court got this right: Judge Hylden viewed Dr. McKee’s point “somewhat convincingly . . . that Mr. Laurion may have made this up” based on the “44%” figure Laurion saw in Wikipedia *after* the incident. Resp. App. 14. This likely fabrication is buttressed because: 1) Dr. McKee was not aware of any such statistics and claims he never said it, and 2) Laurion’s other family members also do not recall it being said that way by Dr. McKee, either. AA-468-469; Resp. App. 45. Simply put, there is strong reason to believe that Laurion fabricated this accusation.

The statement “Well, 44% of hemorrhagic strokes die within 30 days,” which Dr. McKee denies, is even more defamatory when viewed in the context of the entire statement. The “factual recitation” of such a specific statistic to someone who is seriously ill, and had only 10 minutes earlier left the Intensive Care Unit having spent two days there, could be viewed not only as rude and insensitive, but downright morbid, sadistic, and frightening. Taken in context, the Court of Appeals correctly viewed it as one that a reasonable fact finder could regard as “rude, insensitive, and morbid.” Resp. App. 12.

c. It “doesn’t matter” that the gown did not cover the backside

Another statement made by Laurion pertains to the patient’s hospital gown, which allegedly was loose in the back. On his website postings and in his correspondence, Laurion ascribes to Dr. McKee a statement that it “doesn’t matter” if a gown is hanging open in the back. AA-358-60, 401, 404, 407, 410, 413, 416, 419, 422. Dr. McKee denies making this remark, AA-452, 454, which the Appellate Court rightly saw as making him seem “insensitive” and uncaring to the modesty of the patient and family members and would have the effect of lowering his reputation. Resp. Add. 12.

d. “You don’t need therapy”

This statement, which Dr. McKee denies making, falsely casts him as an insensitive, uncaring, and incompetent physician.

Laurion also stated that his father “spent 2 days in ICU after a hemorrhagic stroke. He saw a speech therapist and physical therapist for evaluation” and that his “father mentioned that he’d been seen by a physical therapist and a speech therapist.” AA-360. In the context of a patient who had had a stroke so severe that it resulted in two days in the Intensive Care Unit, it is unfathomable that such a patient would not have a medical need for therapy and it certainly is derogatory to accuse a physician of saying so.

The Court of Appeals correctly viewed the statement’s content as portraying Dr. McKee as “insensitive and inaccurate” because he “hastily concluded that therapy was unnecessary.” Resp. Add. 12. After the patient spent two days in the ICU and other physicians recommended speech and physical therapy, falsely ascribing this remark to Dr. McKee could give him “a reputation for being arrogant and careless.” Resp. Add. 12.

e. “He did not talk” to the family

Laurion goes on to explain that he and his wife left the room while Dr. McKee examined the patient, which is about the only thing that everyone agrees occurred. After Dr. McKee completed his examination and spoke with the patient about his condition, he exited and told the Laurion family that they “can go back in.” AA-401, 404, 407, 410, 413, 416, 419, 422. But on his website postings, Laurion falsely states that Dr. McKee ignored them and left the room without saying anything. As Laurion asserts in his “factual recitation”: Dr. McKee exited the patient’s room and “did not talk” to the patient’s family. AA-358-360. But Laurion admits that Dr. McKee did talk to the three of them, telling them “You can go back in.” AA-401, 404, 407, 410, 413, 416, 419, 422. This disparity reflects the falsity of Laurion’s internet postings and would harm the reputation of the treating physician. Resp. App. 27.

It also, placed in context, suggests that the doctor was “too busy or uncaring” to talk to the patient’s family, which the Court of Appeals correctly viewed as a remark that “could lower the community’s esteem” for Dr. McKee. Resp. Add. 13.

Laurion also asserted that the safety rail of his father’s bed was raised when he was required to stand and his hand was caught in the rail creating yet another “safety risk,” an allegation Dr. McKee also denied. AA-353.

These self-described “factual recitation(s)” are inconsistent, progressively inflammatory, and damaging to the doctor’s reputation. Dr. McKee categorically refutes these offensive accounts. AA-454.

f. Nurse calls him a “real tool”

Finally, Laurion concludes his diatribes by quoting the nurse “friend” that Dr. McKee is “a real tool.” While Laurion asserts that he does not know what it means, he recognizes that it was a “pejorative” comment. AA-319. Yet he published this for the world at large, without knowing its meaning, as a way of degrading the doctor. Even Laurion admits that he “shouldn’t have” used that phrase, but it is too little, too late now. As Laurion belatedly laments:

I was simply stating what had happened. I now feel that perhaps I shouldn't have quoted somebody if I couldn't go back and present her. But at the time, I simply repeated it.

AA-350. (emphasis supplied).

The “real tool” comment that Laurion reported is not only deprecatory, but it seems to be another fabrication by him. He may have conjured up the phantom “nurse,” not simply repeated what a non-existent person never said. Although he calls her a “friend,” with whom he worked for more than seven years, Laurion does not know the name of the nurse and is barely able to describe her at all. An inquiry by Dr. McKee failed to turn up anyone meeting that description. AA-468. Likewise, an independent licensed investigator was unable to find anyone resembling the “friend” to whom Laurion ascribes the “real tool” comment. Resp. App. 19-22. After unsuccessful efforts to locate the maker of the supposed statement, it is doubtful whether she even exists, and the evidence, viewed in the light most favorable to Dr. McKee, as it must be on summary judgment, shows it was a fabrication of Laurion’s fertile imagination, as the Trial Court suggests. Resp. App. 6.

The statement that “Dr. McKee is a real tool,” which Laurion attributes to this phantom “nurse,” could certainly be read by a reasonable person to mean that Dr. McKee had engaged in similar unprofessional conduct and poor medical care in the past. Although this statement itself might be a non-actionable opinion if it was the *only* thing Laurion stated, in the context of his other disparaging statements, this remark by a phantom nurse, who apparently does not exist, adds to the sting of the defamation, casting Dr. McKee in an extremely unfavorable light professionally. As the Court of Appeals noted, this supposed “disapproval of another medical professional is capable of harming [Dr. McKee’s] reputation as a doctor.” Resp. Add. 13.

In *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 501 (1991), the Supreme Court analyzed a number of false quotations, including an alleged quotation attributed to the plaintiff that “two well-respected senior colleagues considered [the plaintiff] an ‘intellectual gigolo.’” The Court held that an admission by the plaintiff, which he denied, “that two well-respected senior colleagues considered him ‘an intellectual gigolo’ could be as, or more, damaging than a similar self-appraisal.” *Id.*

Likewise, in this case the allegation by Laurion that another medical professional considered Dr. McKee a “real tool” is much more damaging than that phrase coming from a family member of a patient.

The phantom nurse “friend” that Laurion claims prompted his defamatory attacks, could be the Rosetta Stone to this case. If Laurion made up the tale of his nurse “friend,” as the record suggests, Laurion is a liar; he fabricated an individual, identified her as a

nurse who knows Dr. McKee; ascribed a pejorative about him to her; and implied that she was representative of the medical profession who looked down on Dr. McKee.

There is a vital fact dispute whether she exists and if she does, what, if anything, she told Laurion that he later published to the world at large. Dr. McKee, under the applicable standard for summary judgment, is entitled to prove that Laurion's nurse "friend" is a figment of Laurion's imagination, an imaginary friend so to speak, and does not really exist.⁴

Even if calling someone a "real tool" is not, in itself, defamatory, the gravamen here is that Laurion fabricated a person, a nurse no less, and ascribed the statement to her, a piece of fiction or falsity, that never happened.

Laurion could counter at trial by proving the existence of this phantom "friend" and identifying her or calling her to testify (by subpoena or otherwise) at trial. Ultimately, the jury must decide, as a matter of law, if she exists and whether she made the comment about Dr. McKee or if Laurion made her up and lied about her. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) ("It is the jury's function to determine credibility."); *see also* 4 Minn. Prac.-Jury Instr. Guides, Civil, CIVJIG 12.15 (5th ed. 2010) (Evaluation of Testimony – Credibility of a Witness), CIVJIG 12.25 (Impeachment), CIVJIG 12.35 (Failure to Produce Evidence – Interference). The jury might determine that if Laurion lied about his phantom "friend," he prevaricated about

⁴As plaintiff, Dr. McKee has the burden to prove falsity. *See Ferrell v. Cross*, 557 N.W.2d 560, 565 (Minn. 1997).

other matters, as well. This credibility concern alone averts summary judgment as a matter of law, and warrants a trial, especially when coupled with Laurion's other lies.

A reasonable jury, viewing these statements as a whole, as they must be, could view them as depicting McKee as a doctor who is incompetent, dangerous, and insensitive to the needs of his patients and their families. Because a reasonable jury could view the statements as defamatory, the Court of Appeals properly held that Summary Judgment is inappropriate.

C. The Statements Are Not “Opinions.”

Laurion’s claim that he made imprecise statements akin to protected opinions is wrong.

In his Answer to the Complaint, ¶ 4, Laurion states that the communications at issue are a “*factual* recitation . . . concerning plaintiff’s conduct in examining defendant’s father at St. Luke’s Hospital.” AA-022. He repeated that sentiment on multiple occasions in his deposition, repeatedly proclaiming that his statements constituted “factual” accounts, not subjective opinions, AA-317, 355, and he was “giving an accurate account of what happened.” AA-326. These admissions alone should have been fatal to his argument on Summary Judgment that his statements are non-actionable “opinions.”

While pure opinion is not actionable as defamation, the category of “opinion” includes only those statements that “cannot reasonably be interpreted as stating facts.” *McGrath v. TCF Bank Sav., FSB*, 502 N.W.2d 801, 808 (Minn. Ct. App. 1993), *aff’d as modified*, 509 N.W.2d 365 (Minn. 1993); *see also Milkovich*, 497 U.S. at 18-21. In other words, if the statement in question “impl[ies] an assertion of objective fact,” it is not

protected by the First Amendment. *Milkovich*, 497 U.S. at 18. As the Supreme Court of the United States has explained:

Even if the speaker states the facts upon which he bases his opinion, *if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.* Simply couching such statements in terms of opinion does not dispel these implications. . . . [It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamation] simply by using, explicitly or implicitly, the words, “I think.”

Id. at 18-19 (first alteration in original) (emphasis added) (citations omitted).

Minnesota courts have found only wholly subjective, unverifiable statements to be opinions, not an account of factual events. *See, e.g., McGrath*, 502 N.W.2d at 808 (plaintiff was a “troublemaker”); *Lund v. Chicago & Nw. Transp. Co.*, 467 N.W.2d 366, 368-69 (Minn. Ct. App. 1991) (plaintiff was a “brown-noser”); *Lee v. Metro. Airport Comm’n*, 428 N.W.2d 815, 821 (Minn. Ct. App. 1988) (plaintiff was flirtatious, fluffy, and a b-tch).

While some of the statements made by Laurion in his website postings and parallel correspondence seem couched as subjective impressions, the remarks that the Court of Appeals viewed as actionable constitute factual statements.⁵ The essence of this case is

⁵ Even though some of Laurion’s comments may be opinions, that does not immunize the balance of the statements, especially those that are provably false “factual recitations.” That portions of offensive statements are not actionable does not give a free-pass to those that are defamatory. *See, e.g., Schlieman*, 637 N.W.2d at 307; *Workman v. Serrano*, No. A05-834, 2006 WL 771580, at *4-5 (Minn. Ct. App. Mar. 28, 2006) (unpublished). Resp. App. 73-74. In fact, the jury instructions can be constructed in a way that highlights the allegedly culpable statements separate from those that are not. 4 Minn. Prac.-Jury Instr. Guides, Civil, CIVJIG 50, Note 1 (5th ed. 2010); CIVSVF 50.90; *see also* Tr. 41-44.

that Laurion conveyed a fabricated account of what transpired in order to portray Dr. McKee in an extremely negative light. Laurion published a fictional account of what occurred when Dr. McKee examined his father. Dr. McKee refutes almost every feature of that account. AA-450-458. That Laurion used very specific, graphic comments and verbatim quotations communicates to the reader that he was conveying “factual” information, not speculation, and renders the “factual” statements individually, and the entire account collectively, actionable.

The use by Laurion of quotation marks in describing Dr. McKee’s supposed statements illustrate their specificity. By ascribing precise quotes to the physician, Laurion carries out his mission – providing a “factual recitation.”

The United States Supreme Court in *Masson*, 501 U.S. at 511, discussed the significance of the use of quotation marks in determining whether a statement is an opinion. The Supreme Court observed:

In general, quotation marks around a passage *indicate to the reader that the passage reproduces the speaker’s words verbatim*. They inform the reader that he or she is reading the statement of the speaker, not a paraphrase or other indirect interpretation by an author. By providing this information, quotations add authority to the statement and credibility to the author’s work. Quotations allow the reader to form his or her own conclusions and to access the conclusions of the author, instead of relying entirely upon the author’s characterization of her subject. . . . *[T]he attribution may result in injury to reputation because the manner of expression or even the fact that the statement was made indicates a negative personal trait or an attitude the speaker does not hold.*

Id. (emphases added).

Likewise, in *Graham v. Boehringer Ingelheim Pharm.*, No. CV040488908S, 2007 WL 3317528 (Conn. Super. Ct. Oct. 19, 2007) (unpublished), Resp. App. 80, a supervisor reported to company officials that the plaintiff had threatened to bring a gun into the workplace and “go postal.” *Id.* at *2, Resp. App. 86. The court held that this statement was not an opinion, but was “in effect, of a fact – that [the employee] made statements. And the statements, if believed by the hearer as coming from [the employee], by their very nature would defame him.” *Id.* at *3, Resp. App. 87. The court, therefore, held that the jury, as trier of fact, must resolve the issue. *Id.* at *5, Resp. App. 89.

In this case, the Court of Appeals insightfully pointed out that the first four actionable remarks, ostensible quotations from Dr. McKee, “objectively and specifically recite” the physician’s supposed words, which he denied saying. Resp. Add. 6. Because it is “verifiable” whether he said them and whether he was “silent” after exiting the room, those statements are factual assertions susceptible to determination by the jury. Resp. Add. 6. So, too, is the quotation – “a real tool” – ascribed to the phantom nurse. Whether these matters actually were said or occurred, as communicated by Laurion, raise factual issues that preclude summary disposition.

Likewise, whether or not there was a nurse who made the specific quotation, is capable of being proven or disproven, and therefore is not an opinion. The question is not whether Dr. McKee is “a real tool,” but, as the Appellate Court noted, whether a real “nurse” said so. This is “susceptible to proof” and, therefore, may be defamatory. *See Schlieman*, 637 N.W.2d at 308.

The context of deprecatory remarks reflects why the internet postings and letters are actionable. Laurion published the internet remarks to the world at large, knowing they would be seen by anyone, anywhere, with access to the internet. Laurion was upset. He knew that Dr. McKee was highly-regarded and had a stellar reputation. He wanted to get him in trouble with his peers or colleagues and to lower his reputation. As Laurion states:

I thought that somebody with an M.D. after his name would call him in and say, "We don't like getting complaints like this. Could you be a little friendlier in the future, and we'll consider this over." . . . I wanted somebody to tell him that they either felt that that was poor behavior or that the writer thought that was poor behavior and we don't like getting letters like this.

AA-335.

The sheer magnitude of Laurion's libel is reflective of its harm. His stated desire was to expose Dr. McKee's allegedly improper medical practices to the world at large, including current and potential patients visiting the websites, and in the voluminous correspondence to professional colleagues and peers.

Thus, the misstatements of his publications, their universal recipients, and Laurion's underlying motivation all show that he thought his "factual recitation" would harm Dr. McKee's reputation. It is untenable for him to now deny what he purposefully set out to accomplish.

In sum, Laurion made a "factual recitation" of events that did not occur. They are not legally protected opinions, but are admittedly factual observations that would

inevitably and inherently lower the esteem of Dr. McKee as a professional, and are defamatory *per se*.

D. The Statements Are False

Not only are Laurion's statements "factual," as he describes them, but they are false, too.

Laurion's argument that some of the statements are true, or substantially true, is wrong. Dr. McKee denies them all. This raises the threshold issue of fact for resolution by the jury. *Lewis v. Equitable Life Assurance Socy.*, 389 N.W.2d 876, 889 (Minn. 1986) ("the truth or falsity of a statement is inherently within the province of the jury"); see also *Morey v. Barnes*, 212 Minn. 153, 156, 2 N.W.2d 829, 831 (1942).

But the statements at issue are palpably false. For example, Laurion made a subtle, but significant change in his account of the hospital encounter from the letters he sent to the later Internet postings. In the letters, he quoted Dr. McKee as saying "some" stroke patients die in the Intensive Care Unit. But, in the subsequent websites, he quotes the physician as saying "44%" of patients expire there. *Appellant's Brief*, p. 6. This change from "some" to the specific "44%" is significant because Laurion looked in Wikipedia and found the "44%" figure *after* the encounter with Dr. McKee, who denies ever saying, or hearing of, the statistic. Thus, Laurion made up the statement and falsely placed it, with quotation marks, no less, in Dr. McKee's mouth. It is not substantially true that Dr. McKee said this, it is wholly false. Even the Trial Court found it "somewhat convincing[]" that Laurion "may have made this up after the fact." Resp. App. 14.

Similarly, Laurion's accusation that Dr. McKee left the hospital room "without speaking" to the family is palpably false, too. The doctor told the family, as Laurion acknowledges, that they could go back in the room now. AA-314. The reticence ascribed to Dr. McKee by Laurion is not just a failure to "stop to chat." Laurion now admits that Dr. McKee did speak to the family, albeit briefly, when he left the hospital room. AA-314. *Appellant's Brief*, p. 18. Laurion portrays the doctor as ignoring the family when he did, in fact, acknowledge their presence and spoke to them.

Laurion's encounter with the phantom "nurse," who Laurion could not identify and who cannot be found, is another apparent fabrication that is "susceptible of proof." Resp. Add. 6.

In addition, Laurion put at least four specific statements in Dr. McKee's mouth that the physician claims he never said ("transferred or died; "44% die;" loose gown "doesn't matter;" "You don't need therapy.") and took some words out of his mouth that he did say ("did not talk" to the family), and even made up words from a fabricated "nurse" ("a real tool") that were never said. The Court of Appeals correctly determined that these falsified factual statements all cast the doctor in a negative light and could be harmful to his reputation. Resp. Add. 8-13. There are triable issues of fact concerning the truthfulness of Laurion's "factual recitations," whether the statements harmed the reputation of Dr. McKee, and the resulting damages. All of these determinations should be left to the trier-of-fact, the jury. *Morey*, 212 Minn. at 156, 2 N.W.2d at 831; *Rowe v. Munye*, 702 N.W.2d 729, 746 (Minn. 2005) (jury determines

damages); *Northfield Nat'; Bank v. Assoc. Milk Producers, Inc.*, 390 N.W.2d 289, 298 (Minn. Ct. App. 1986) (damages in a per se defamation case are for jury to decide).

II. The Health Care Bill of Rights Is Inapplicable

Finally, Laurion's search for a qualified privilege under the Patient's Health Care Bill of Rights, Minn. Stat. § 144.651, is unavailing for several reasons. *Appellant's Brief*, pp. 24-25.

First, the issue was not raised before the Court of Appeals or in its Petition for Review to this Court. Because it was not raised below or in its Petition for Review, it is waived. *City of West St. Paul v. Kregel*, 768 N.W.2d 352, 355, n. 3 (Minn. 2009) ("We do not reach this issue because it was not raised in the . . . petition for review of the court of appeals' decision"); *Crossroads Church of Prior Lake Minn. v. County of Dakota*, 800 N.W.2d 608, 617 (Minn. 2011) (citing *Thiele v. Stich*, 425 N.W.2d 580, 582 (1988)).

Moreover, while the statute certainly encourages patients to make their views known to the medical profession, there is no applicable privilege here for several reasons: (1) the statute refers only to actions by patients, not family members; and (2) the statute contains no privilege or immunity, as Laurion asserts. If a privilege or immunity, had been intended, the legislature would have so specified in the statute, as it has done for complaints to the Medical Board and other matters. *See, e.g.*, Minn. Stat. § 147.121 (reports to medical board "absolutely privileged"); Minn. Stat. § 145.63 (immunity for participation on medical review organization).

Thus, there is no basis for assertion of privilege relating to the Patient's Bill of Rights, which does not furnish a license to family members of patients to commit libel.

Even if some type of privilege exists, *which it does not*, it is only a qualified one and defeated with a showing that the defendant “made the 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, 257 (Minn. 1980) (quoting *McKenzie v. William J. Burns Int’l Detective Agency, Inc.*, 149 Minn. 311, 312, 183 N.W. 516, 517 (1921)). Laurion would even be liable under the higher standard of privilege which applies to public officials under *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964), which need not be met here, “knowledge of falsity or reckless disregard as to truth or falsity.” *Masson*, 501 U.S. at 513. As the Court held in *Masson*, “[D]eliberate alteration of the words uttered by a plaintiff” shows knowledge of falsity when “the alteration results in a material change in the meaning conveyed by the statement.” *Masson*, 501 U.S. at 517. Laurion attributed statements to Dr. McKee which he denies. Whether Dr. McKee made the statements is an issue of fact. There is ample evidence of malice here. Thus, the issue of malice is a factual one that must be decided by the jury. *Stuempges*, 297 N.W.2d at 258.

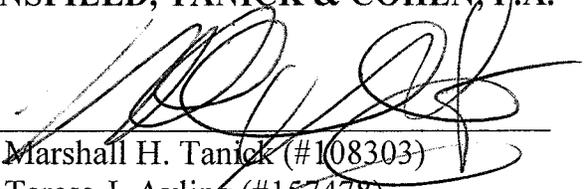
In sum, six controverted statements constitute factual statements capable of being defamatory. They constitute actionable defamation and a jury must determine if they are false, harmful to Dr. McKee’s reputation, and, if so, award damages.

CONCLUSION

For the above reasons, the decision of the Court of Appeals should be affirmed and this case remanded for trial.

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Dated: May 24, 2012

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