STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF ST. LOUIS | SIXTH JUDICIAL DISTRICT

David McKee, M.D.,

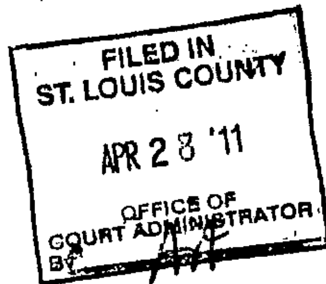
Plaintiff,

v.

Dennis Laurion,

Defendant.

File No. 69-DU-CV-10-1706



COURT'S ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The above-captioned matter came before the undersigned judge of District Court on February 10, 2011, pursuant to Defendant's motion for summary judgment. Plaintiff was represented at the hearing by his attorney, Marshall H. Tanick. Defendant was represented at the hearing by his attorney, John D. Kelly. The Court reviewed all of the submissions made by the parties, including the affidavits, and also requested and received the whole deposition transcript of Defendant McKee. Based on all of the foregoing, and deeming itself fully advised on the premises, the Court hereby issues the following:

ORDERS:

1. Defendant's motion for summary judgment is granted.
2. Plaintiff's claim is dismissed, with prejudice.

3. The attached memorandum of law is incorporated herein by reference.

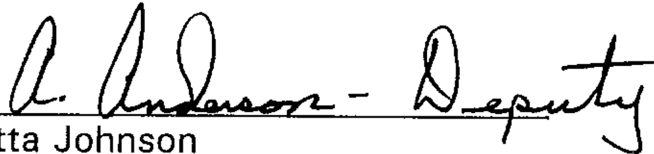
Dated this 27th day of April 2011.

BY THE COURT:

Eric L. Hylden
Judge of District Court

The foregoing constitutes the judgment of the Court in this matter.

Dated this 28 day of April, 2011.



Marietta Johnson
Court Administrator

MEMORANDUM OF LAW

This is a defamation lawsuit by a doctor against the son of one of his patients, who had posted unflattering comments about Plaintiff on certain Internet websites and sent letters to various groups about what he saw as Dr. McKee's insensitive treatment of his father. Dr. McKee sued

approximately one month after the statements were made, and Defendant Laurion has now brought a motion, asking the entire case be dismissed, as none of the statements are actionable.

STATEMENT OF FACTS

On April 20, 2010, Defendant Dennis Laurion's father, Kenneth Laurion, was in St. Luke's Hospital in Duluth, having suffered a hemorrhagic stroke. On that day, he was moved from the intensive care unit (ICU) to a standard hospital room. Mr. Kenneth Laurion's family, including the Defendant, were with him in his room. A referral had been made to Dr. McKee internally within St. Luke's, as Dr. McKee is a neurologist and would commonly evaluate patients who just had a stroke. Upon receiving the referral, Dr. McKee was at first unaware that Kenneth Laurion had been transferred out of the ICU, but eventually tracked him to the right room. Once Dr. McKee arrived, there is disagreement about what was said or done by Dr. McKee. The Court believes that the differences, however, tend to be issues of tone, feeling and nuance – overall the parties agree on the substance of how things went. Essentially, Dr. McKee did a neurologic examination of Kenneth Laurion, but Dennis Laurion felt that the things he said and did before, during and after the

examination were insensitive to Kenneth Laurion's dignity. Defendant Laurion then posted a 'factual recitation' on some Internet doctor rating sites, and later sent letters to a number of individuals and organizations, making statements about how his father was treated by Dr. McKee. The statements (and Dr. McKee's response to them) as alleged in paragraphs 3 and 5 of Plaintiff's complaint are as follows:

1. Mr. Laurion alleged that Dr. McKee "seemed upset" that his father had been transferred from ICU to a general hospital room (Dr. McKee denies this);
2. And that Dr. McKee said he had to "spend time finding out if you (Kenneth Laurion) were transferred or died." (Dr. McKee states that he had attempted to add some levity to the situation by making the 'transferred or died' comment.);
3. Dennis Laurion goes on to quote Dr. McKee for the statistic that "44 percent of hemorrhagic strokes die within 30 days. I guess this is the better option." (Dr. McKee vehemently denies that he ever gave anything like a percentage, and in fact accuses Defendant of pulling the number off of Wikipedia after the fact. He does, however, admit that he would have said something about there being only one of two

ways to leave the ICU – improving to a transfer into a regular hospital bed, or dying.);

4. Dennis Laurion's Internet postings stated that when Dr. McKee had been told of some physical therapy Kenneth Laurion had been doing, he was told, "You don't need therapy." (Dr. McKee denies making any such statement.);

5. At one point in the examination, Dr. McKee was having Kenneth Laurion sit up and move to the edge of the bed to see if he could stand. His hospital gown (as they are wont to do) came open in the back and someone mentioned a concern about that. Dr. McKee allegedly said that "it doesn't matter." (In his deposition, Dr. McKee testified about hearing the family member's comment: "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 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.");

6. Next, the complaint alleges that Defendant defamed Dr. McKee by publishing that Dr. McKee strode out of the room at the end of the examination without talking to the family. (Dr. McKee states that

after leaving the room, he told the family that they could go back into the room.)

7. Dennis Laurion's Internet postings indicate that after this incident, he bumped into a former coworker who is a nurse. After describing the incident, this friend allegedly guessed that it was Dr. McKee, and that she had said that Dr. McKee "is a real tool!" Mr. Laurion repeated that phrase in his Internet postings. (Dr. McKee doubts the very existence of this 'friend,' as Mr. Laurion, at his deposition, was unable to even provide a very good description of her, much less a name or other identifying information. Dr. McKee hired a private investigator, who was unable to come up with anything more detailed.);
8. In some of the post-incident letters, Mr. Laurion characterizes Dr. McKee as blaming Kenneth Laurion for the loss of his time.
9. Next, Mr. Laurion's letter indicates that when Plaintiff left the patient's room, that he was "scowling."
10. Defendant's letters say that Dr. McKee treated their relative as a "task and charting assignment."

11. Finally, Defendant's letters allege that Plaintiff did not treat Kenneth Laurion with "dignity."

LEGAL STANDARD

Rule 56.03, Minn.R.Civ.P. provides that a motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. Summary judgment is not appropriate when reasonable persons might draw different conclusions from evidence presented.

To preclude entry of summary judgment, genuine issues of material facts must be established by substantial evidence. "Substantial evidence" refers to legal sufficiency and not to quantum of evidence. DLH, Inc. v. Russ, et. al, 566 N.W.2d 60 (Minn. 1997). The Court must not weigh evidence in deciding whether a genuine issue of material fact exists. However, the Court is not required to ignore its conclusion that a particular piece of evidence may have no probative value.

A material fact is one that will affect the outcome or result of the case. Zappa v. Fahey, 245 N.W.2d 258 (1976). The facts must be

viewed in a light most favorable to the nonmoving party, and all doubts and factual inferences must be resolved against the moving party. Hopkins by LaFontaine v. Empire Fire & Marine Ins. Co., 474 N.W.2d 209 (Minn. App. 1991).

The trial court is not to decide or resolve the fact issues at the summary judgment hearing, but rather determine if there is room for an honest difference of opinion among reasonable people, and deny the motion where such debate is possible. Trepanier v. McKenna, 125 N.W.2d 603, 606 (Minn. 1963); Jonathan v. Kvaal, 403 N.W.2d 256, 259 (Minn. App. 1987), review denied (Minn. May 20, 1987).

Defamation consists of a false statement of fact made to third parties that harm the reputation of the subject of the statements. Milkovich v. Lorain Journal Co., 497, U.S. 1, 17-18 (1990) and Geraci v. Eckankar, 526 N.W.2d 391, 397 (Minn. App. 1995). A trial court is to review the statements, which must be set forth in the complaint (See, Benson v Northwest Airlines, Inc., 561 N.W.2d 530, 538 (Minn. App. 1997) review (Minn., June 11, 1997.), and see whether any fact disputes would prevent summary judgment, as well as whether either party would be entitled to summary judgment as a matter of law. This Court will look

at individual statements, but also looks at the postings and letters as a whole. See Jadwin, Supra, 390 N.W.2d at 443.

"The district court makes an initial determination of whether the statements are reasonably capable of carrying a defamatory meaning." Schlieman v Gannett MN Broadcasting, Inc., 637 N.W.2d 297, 307 (Minn. App. 2001), citing Utecht v Shopko Department Store, 324 N.W.2d 652, 653 (Minn. 1982). Of course, "True statements, however disparaging, are not actionable. "Lewis v Equitable Life Assurance Society, 398 N.W.2d 876, 888 (Minn. 1986), citing Stuempges v Parke, Davis & Co., 297 N.W.2d 252, 255 (Minn. 1980).

"However, statements about matters of public concern that are not capable of being proven true or false, and statements that cannot be interpreted as stating facts are protected from defamation actions by the First Amendment." McGrath v TCF Bank Savings, 502 N.W.2d 801, 808 (Minn. App. 1993), citing Milkovich v Lorain Journal, Co., 497 U.S. 1, 19-21, 110 S. Ct. 2695, 2706-07, 111 L.Ed.2d 1 (1990). Minnesota courts apply for a four part test to determine if a statement is actionable: "(1)the statement's precision and specificity; (2) the statements verifiability; (3) the social and literary context in which the statement was made; and (4)

the statement's public context." (Huyen v Driscoll, 479 N.W.2d 76, 79 (Minn. App. 1991). The Court applies this test, because "Whether a statement can be proven false or interpreted as stating facts is a question of law." McGrath, supra, 502 N.W.2d at 808.

Some guidance is provided to the courts in this endeavor by other appellate decisions: "Expressions of opinion, rhetoric, and figurative language are generally not actionable if in context, the audience would understand the statement is not a recitation of fact." Jadwin, supra, 390 N.W.2d at 441. Put another way, "[I]f it is plain that the speaker is expressing a 'subjective view, an interpretation, a theory, conjecture or surmise,' rather than claiming to be in possession of 'objectively verifiable facts,' the statement is not actionable. Schlieman, supra, 637 N.W.2d at 308, citing Haynes v Alfred A. Knopf, Inc., 8 F.3d 1222, 1227 (7th Cir. 1998).

Further guidance is derived from the treatment specific statements have received, as reported in Minnesota appellate decisions. What follows is a chart, showing what types of statements have passed the four part test, and what have failed.

CITE	NAME	STATEMENT	DISPOSITION
390 N.W.2d 289 (Minn. App. 1986)	Northfield National Bank v Assoc. Milk Producers	Hauler terminated for poor service	Jury verdict $20K vacated by trial court
297 N.W.2d 252 (MN 1980)	Stuempges v Parke, Davis & Co.	Plaintiff should not be in sales	Jury verdict $37,750
632 N.W.2d 732 (Minn. App. 2001)	Bebo v Delander	'asshole' and "c---sucker' Plaintiff will 'f--- you over' Plaintiff 'blocking other drivers'	Nonfactual opinion, Prediction of future True in essence
637 N.W.2d 297 (Minn. App. 2001)	Schlieman v Gannett MN Broadcasting	Victim wasn't aggressive toward officer. "Officer's story conflicting with neighbors"	Subjective Subjective opinion
766 N.W.2d 910 (Minn. 2009)	Bahr v Boise Cascade Corporation	'Emotional' 'threatening' 'lazy'	Court upholds jury question on malice overriding privilege
557 N.W.2d 560 (Minn. 1997)	Ferrell v Cross	'Mentally unstable' 'Incompetent,' 'bitch, 'chronic complainer	No decision on validity of claims only that state law applies
465 N.W.2d 88 (Minn. App. 1991)	Hunt v U of M	Lacks warmth and sincerity Not qualified for position	Can't be proven false SAA, and, in context, is an opinion
324 N.W.2d 652 (Minn. 1982)	Utecht v Shopko Department Store	'shopper's charge – do not accept'	No summary judgment, jury questioned if it's defamatory
390 N.W.2d 437 (Minn. App. 1986)	Jadwin v Minneapolis Star & Tribune Company	Inaccurate descriptions of plaintiff's business experience	Summary judgment reversed, question for jury
502 N.W.2d 801 (Minn. App. 1993)	McGrath v TCF Bank Savings	'troublemaker'	Because making trouble is in the eye of the beholder, it Does not state facts

479 N.W.2d 76, 79 (Minn. App. 1991)	Huyen v Driscoll	'uneven use of authority' 'insufficient level of accountability' 'unwillingness to participate'	Hybrid - does not state facts
467 N.W.2d 366 (Minn. App. 1991)	Lund v Chicago & NW Transportation Co.	'brown-nose' 'favoritism' 'move-ups'	Does not state facts
428 N.W.2d 815, 821 (Minn. App. 1988)	Lee v Metropolitan Airport Commission	'fluffy' 'flirtatious' 'bitch'	Does not state facts
469 N.W.2d 471, 473 (Minn. App. 1991)	Weissman v Sri Lanka	'dishonest'	Actionable

Taken 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. While Dr. McKee's complaint alleges that all of the comments made by Mr. Laurion are utterly false, there is a common thread tying together both sides of this story. Some of that common thread comes from Dr. McKee's own testimony. In modern society, there needs to be some give and take, some ability for parties to air their differences. Today, those disagreements may take place on various Internet sources. Because the medium has changed, however, does not make statements of this sort any more or less defamatory. Looking at the statements as a whole, the Court does not

find defamatory meaning, but rather a sometimes emotional discussion of the issues.

Taking each of the statements individually, the Court also finds no individual statement to be defamatory:

1. **Dr. McKee seemed upset about the transfer from ICU** – From the Court's perspective, this is a completely subjective opinion expressed by Mr. Laurion. For a number of statements like this, the Court considered the question of what exactly the jury would be asked to decide: Here, the question would have to be whether Dr. McKee seemed upset to Mr. Laurion. In summary, there simply is no 'fact' that might be proven false.

2. **Dr. McKee 'had to find out if you transferred or died'** – Dr. McKee admits in his deposition that he made a statement substantially similar to this one, characterizing is as a 'jocular' comment. While Dr. McKee recalls the language that he used slightly differently, the import was the same. Given that truth is a complete defense to a claim of defamation, the Court finds no basis for a defamation claim on this item.

3. The 44 percent comment – Dr. McKee finds this statement especially offensive, given that he had never heard of the percentage quoted by Mr. Laurion and because he posits, somewhat convincingly, that Mr. Laurion may have made this up after the fact based on a figure he obtained from Wikipedia. The problem is that, even if the figure used was made up, and therefore false, the general import of the conversation (that some stroke patients never make it out of the ICU alive) is true, as confirmed by Dr. McKee in his deposition. Where the 'gist' or 'sting' of the alleged statement is true, the Jadwin Court instructs us it is not defamatory, even if some particular of the statement is false. See Jadwin, 390 N.W.2d at 441.

4. "You don't need therapy" – The Court finds this statement is not capable of carrying a defamatory meaning. Even if we assume that Dr. McKee never said those words, it is difficult to see how such a statement would lower anyone's opinion about Dr. McKee. Based on the information available, that could well be a perfectly valid medical opinion. There is nothing about it that suggests that Dr. McKee does not meet up to any personal or professional standard.

5. The gown incident – Dr. McKee also complain about Mr. Laurion's retelling of the hospital gown incident – specifically, that Dr. McKee had said "that doesn't matter." In his deposition, however, Dr. McKee describes essentially the same incident, noting his perception that since the top of the gown was tied securely, it would not fall off entirely, and stating that it never even crossed his mind that the Laurion family might be concerned about the back of the gown falling open. Thus, the 'gist or sting' of Defendant's postings and letters on this subject are true, although they have a different perspective.

6. He left the room without talking to the family – The next allegedly defamatory statement is that Dr. McKee left the room without talking to the family. Dr. McKee's version is that he left the room and told the family "You can go in now." Again, the parties are talking about the same thing, from different perspectives. It is hardly worth calling a jury together to determine if "not talking to the family" was meant literally as in not a single word, or figuratively in that Dr. McKee did not say anything substantive about his examination of Mr. Laurion. There is simply nothing for a jury to decide here.

7. **"A real tool"** – Plaintiff also complains of Mr. Laurion republishing another person's description of him as 'a real tool.' Interestingly, no one could say what the term means, although everyone assumed that it was not complimentary. Either way, it does not matter because the term falls squarely into the same category as 'troublemaker' and 'brownnose,' as outlined in McGrath and Lund, supra. As is evidenced by the fact that no one knows its meaning, the term is too vague to be defamatory.

8. **The Plaintiff blames his patient for the loss of his time** – This is the first of the statements not published on the Internet, but included in letters Defendant sent out to various individuals and organizations. All of them simply offer Defendant Laurion's perception. This is fatal to Dr. McKee's lawsuit on summary judgment, because it is evident that none of them constitute provable facts. With this allegation, for example, it would be impossible for one side or the other to prove or disprove Mr. Laurion's perception – that Dr. McKee blamed Kenneth Laurion for the loss of Dr. McKee's time. Clearly, Dr. McKee could come in and testify that he did not. Similarly, Mr. Laurion could come in and testify that this was his perception of Dr. McKee's demeanor. In the end, the jury

would be left to divine the internal feelings of others, rather than whether a given fact was probably true or false.

9. **"Scowling"** – Similarly, Mr. Laurion's perception that Dr. McKee was scowling as he left the room is not a provable fact. What some people might perceive as a scowl might simply be another person's standard facial expression. Even if we had a videotape that recorded the expression, the jury would be left with an allegation on one side and a denial on the other as their only basis for making a decision on whether defamation had occurred. This is not enough.

10. **The patient was a task or a charting assignment** – Dennis Laurion's subjective evaluation of how his father was treated falls into the category of opinion. As with the preceding items, this leaves nothing for the jury to decide.

11. **Dr. McKee failed to treat the patient with dignity** – This, more than any other allegation, constitutes an unprovable subjective opinion. As with the others, both parties could undoubtedly produce testimony to support their version of things, but it would be impossible for Plaintiff or Defendant to prove an opinion – whether Kenneth Laurion was treated "with dignity." We could certainly ask a jury to form their own

opinion, but the jury's proper role is to find facts. Based on the information provided to the Court, there would not be enough objective information to justify a jury trial in this matter.

ELH