IN THE

Supreme Court of Virginia

RECORD NO. 121797

BRADLEY J. CASHION,

Appellant,

v.

ROBERT S. SMITH, *et al.*,

Appellees.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

1. The trial court impermissibly viewed the euthanasia statements in isolation and Dr. Cashion did not waive his challenge to the ruling that Dr. Smith's other statements accusing Dr. Cashion of substandard care and criminal conduct were not defamatory 3

2. Whether Dr. Smith's statement was made in good faith, whether malice exists and whether he lost or abused the qualified privilege are disputed questions of fact..... 6

3. Under the circumstances, a person who overheard Dr. Smith's accusations could reasonably believe that they were true 10

CONCLUSION..... 12

CERTIFICATE OF SERVICE..... 13

TABLE OF AUTHORITIES

CASES

Aylor v. Gibbs,
143 Va. 644 (1925) 2, 7

Fuste v. Riverside Healthcare Assoc., Inc.,
265 Va. 127 (2003) 1, 2, 8

Georgandellis v. Holzer Clinic, Inc.,
Case No. 2:08-cv-626, 2009 U.S. Dist. LEXIS 47334 (S.D. Ohio,
June 5, 2009) 2

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974) 1

Great Coastal Express, Inc. v. Ellington,
230 Va. 142 (1985) 7, 9

Helms v. Manpile,
277 Va. 1 (2009) 5

Hyland v Raytheon Tech. Servs. Co.,
277 Va. 40 (2009) 4

Larimore v. Blaylock,
259 VA. 568 (2000) 6

Levisa Coal Co. v. Consolidation Coal Co.,
276 Va. 44, n.1 (2008) 5

Lewis v. Kei,
281 Va. 715 (2011) 4, 9

Smalls v. Wright,
241 Va. 52 (1991) 2, 8

Tharpe v. Saunders,
285 Va. 476 (2013) 1

Yeagle v. Collegiate Times,
255 Va. 293 (1998) 10

STATUTES

Virginia Code § 8.01-384(A) 5

REPLY BRIEF

Dr. Smith loudly and repeatedly accused Dr. Cashion of killing a patient. This accusation, which *was not* made during a peer review process, enjoys no constitutional protection. Rather, it is a textbook case of defamation. It is speech which accuses Dr. Cashion of a crime, flies in the face of the Hippocratic Oath, damages his professional reputation, and destroys confidence in his skills as a physician. This Court has found, on far less egregious facts, that statements accusing a physician of professional incompetence are defamatory. *Fuste v. Riverside Healthcare Assoc., Inc.*, 265 Va. 127, 132 (2003) (defendant accused physicians of abandoning their patients and said there were "concerns about competency").

Dr. Smith and his employer cite no case where a court has held that one physician's charge that another physician killed a patient is constitutionally protected speech. This is because there is no constitutional value in a false statement of fact, *Tharpe v. Saunders*, 285 Va. 476, 481 (2013) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)), and there is no public policy advanced by such speech under the circumstances presented here. In fact, one federal court has held that a statement by one physician accusing another of euthanizing a patient is defamatory *per se*.

Georgandellis v. Holzer Clinic, Inc., Case No. 2:08-cv-626, 2009 U.S. Dist. LEXIS 47334 (S.D. Ohio, June 5, 2009).

Nevertheless, Dr. Smith seeks to cloak himself in a qualified privilege that attaches to good faith communications between persons having a common duty on a matter of legitimate concern. Because good faith was lacking, Dr. Smith was not entitled to the privilege that might ordinarily have attached to a well-intentioned, professional conversation concerning a patient's care. The existence of a qualified privilege depends on questions of disputed fact, including good faith and whether the privilege was abused. *Fuste*, 265 Va. at 135 (malice and loss or abuse of the privilege present questions of fact); *Smalls v. Wright*, 241 Va. 52, 55-56 (1991) (loss or abuse of the privilege presents questions of fact); *Aylor v. Gibbs*, 143 Va. 644, 647 and 654 (1925) (good faith is a question of fact).

Finally, Dr. Smith's characterization of his defamatory statements as rhetorical hyperbole is off the mark. Hyperbolic speech is loose language that no reasonable listener would take seriously. That is not the case here. Dr. Smith's statement, made immediately after the death of a patient treated by both parties, could be taken to be literally true. Because Dr. Cashion is an anesthesiologist and controlled the patient's airway and sedation, he could be understood to have "made a deliberate decision with

the anesthesia," as the trial court found. (JA 243). Under these circumstances, Dr. Smith's accusation that Dr. Cashion killed the patient was not an off-handed exaggeration that no one would take seriously. It was a deadly-serious charge – lodged multiple times[1] – and was reasonably understood to mean that Dr. Cashion had killed the patient.

1. The trial court impermissibly viewed the euthanasia statements in isolation and Dr. Cashion did not waive his challenge to the ruling that Dr. Smith's other statements accusing Dr. Cashion of substandard care and criminal conduct were not defamatory.

Dr. Smith's repeated verbal assault on Dr. Cashion after the patient's death were not limited to accusing Dr. Cashion of euthanizing the patient; however, the trial court held that only the euthanasia statements were actionable. It summarily held that these non-euthanasia statements were merely opinion: "he [the patient] could have made it with better resuscitation"; "this was a very poor effort"; "you didn't really try"; "you gave up on him"; "you determined from the beginning that he wasn't going to make it and purposefully didn't resuscitate him." Although the trial court was presented with a question of law on this issue, it erred in failing to consider these statements together with the euthanasia statements that the court had found were statements of fact.

[1] JA 6-7.

The trial court was required to examine all of the statements as a whole in determining whether they are pure expressions of opinion or, rather, provable fact. *Lewis v. Kei*, 281 Va. 715, 725-726 (2011); *Hyland v Raytheon Tech. Servs. Co.,* 277 Va. 40, 47 (2009). Instead, it examined the non-euthanasia statements in isolation from what it found to be the only statements of provable fact.[2] (JA 65-66). Considering all of the statements Dr. Smith made to Dr. Cashion at the hospital in the context of his contemporaneous assertion that Dr. Cashion killed the patient, the trial court should have concluded that those statements, taken as a whole, assert provably false matters about the Dr. Cashion's care of the patient. *Lewis*, 281 Va. at 725 (factual statements made in support of an opinion are actionable).

Even standing alone, the non-euthanasia statements contain provably false statements. Whether the patient would have survived with better resuscitation and whether Dr. Cashion purposefully failed to resuscitate the patient are matters of medical fact, not pure opinion. Indeed, the cause of death is a medical fact. So too are the patient's vital

[2] The trial court found that Dr. Smith's charge that Dr. Cashion euthanized the patient is "provably false" and is not opinion. (JA 66). As the defendants have not appealed this finding, it is final.

signs, the nature and extent of the care that was delivered, and the patient's response to the care he received.

Finally, Dr. Cashion did not waive this error. His endorsement of the January 20, 2011 order as "we ask for this" (JA 60-61) did not affirmatively waive his well-stated position on the record that the non-euthanasia statements were fact-based. (JA 11, 55-56, 282-285). Once a litigant informs the court of his or her legal argument, there can be no waiver under Code § 8.01-384(A) unless the record "affirmatively show[s] that the party who has asserted an objection has abandoned the objection or has demonstrated by his conduct the intent to abandon that objection." *Helms v. Manpile*, 277 Va. 1, 6-7 (2009) (where defendants' written closing argument stated their position, their endorsement of the final order as only "seen" did not waive their closing argument).

Dr. Cashion had substantially prevailed on the demurrer, as evidenced by the trial court's directive that his counsel prepare the order memorializing that ruling. (JA 66-67). By asking for entry of that order, Dr. Cashion did not affirmatively waive his position – which was well-known to the trial court – that the non-euthanasia statements were provably false and actionable. *See Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 56, n.1 (2008) ("It is entirely proper for a party to request that a court

memorialize in an order a ruling made from the bench, even when that ruling is contrary to the party's interest.") That position was set forth in the record and the failure to object to the portion of the order that reflected an adverse ruling did not expressly waive or withdraw that position.

2. Whether Dr. Smith's statement was made in good faith, whether malice exists and whether he lost or abused the qualified privilege <u>are disputed questions of fact.</u>

This Court must also consider whether the euthanasia statements were qualifiedly privileged as a matter of law, leaving no question for the jury to decide. At the heart of this appeal is the question whether the trial court impermissibly decided disputed questions of fact concerning the qualified privilege.

The qualified privilege, which typically applies in an employment context, is grounded in public policy. *Larimore v. Blaylock*, 259 Va. 568, 572-573 (2000). Good faith is a central consideration for application of the qualified privilege: "The question is not as to the truth or falsity of the communication, or whether the action taken by the defendant with reference thereto or based thereon was right or wrong, but whether the defendant in making the publication acted in good faith or was inspired by malice." *Id.* at 573.

The trial court decided as a matter of law that Dr. Smith's statements were made in good faith. (JA 243, 255, where Carilion admits this point). There is no dispute that good faith is a prerequisite for a finding that a defendant's statements are entitled to the protection of the qualified privilege. *Great Coastal Express, Inc. v. Ellington*, 230 Va. 142, 153 (1985). Good faith is a question of fact for the jury. *E.g.*, *id.*; *Aylor v. Gibbs*, 143 Va. 644, 645 (1925).

The existence of good faith necessary to support the qualified privilege is a disputed fact. Dr. Smith's statements were made after the patient had died (and therefore at a time when corrective action was no longer possible), were made in the presence of someone outside of the treatment team, were loud and aggressive, were made outside of the normal Carilion peer review process, openly accused Dr. Cashion of a crime, and were unprofessional. And even though the patient's death was almost a foregone conclusion due to his extensive injuries and delayed treatment (as Carilion argues in its brief at pages 33-34), Dr. Smith still blamed the death on Dr. Cashion's intentional decision to kill him. If that were not enough, even though Dr. Smith knew Dr. Cashion did not kill the patient, he repeated the accusation multiple times, further evincing his bad faith. (JA 5-13). On this record, the trial court erred in deciding as a matter

of law that Dr. Smith acted in good faith in accusing Dr. Cashion of killing the patient.

Even if the qualified privilege attaches to the euthanasia statements, there was evidence of common law malice that required this case to be submitted to the jury. Carilion routinely marginalized physicians, like Dr. Cashion, who were not its employees. (JA 8-9). Having adopted his employer's policy, Dr. Smith made these statements to discredit and injure Dr. Cashion because he was not a Carilion employee. (JA 12). Dr. Smith harbored ill-will against Dr. Cashion. (JA 12). This evidence of malice, which is independent of the euthanasia statements, demonstrates Dr. Smith's ill-will towards Cashion.[3]

The trial court also decided as a matter of law that Dr. Smith did not abuse or lose the qualified privilege. (Br. of Appellee Dr. Smith, p.29; "the circuit court correctly held that as a matter of law he did not abuse the qualified privilege"). This Court has repeatedly held that whether a qualified privilege is lost or abused is usually a question of fact for the jury. *See, e.g., Fuste*, 265 Va. at 134; *Smalls v. Wright*, 241 Va. 52, 55-56 (1991); *Great Coastal Express, Inc.*, 230 Va. at 153-54. For the very same

[3] The defendants based their motion for summary judgment on the Amended Complaint and responses to request for admissions. (JA 101). As the recited facts come from these sources, Dr. Smith cannot now complain that Dr. Cashion should have had more evidence of malice.

reasons that bad faith and malice exist, (see discussion at pages 7-8), the jury should have decided whether the privilege was lost or abused. Indeed, any privilege that attaches to Dr. Smith's public accusation that Dr. Cashion killed the patient is qualified, not absolute.

The qualified privilege arises from public policy favoring open and honest communications. *Larimore*, 259 Va. at 572-573. However, there is no sound public policy for protecting one physician's false charge that another physician killed a patient (made outside of the peer review process), particularly where the patient's death was caused by his catastrophic injuries and not by what occurred in the operating room. The better public policy argument in this case belongs to Dr. Cashion.[4]

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[4] Dr. Smith argues that this Court must also examine his written statements about Dr. Cashion (made later that night) in determining whether Dr. Smith abused the qualified privilege and whether his statement was rhetorical hyperbole. (Br. of Appellee, pp. 29-30, 35-36). This is incorrect. This action does not concern the self-serving writing Dr. Smith made to later justify his earlier unreasonably harsh comments at the hospital. Rather, this action concerns the verbal assault he launched at Dr. Cashion after the patient died. Although it is true that a court must examine all of the allegedly defamatory statements, that examination relates to the statements which are the subject of the suit and to "whether a statement is one of fact or opinion" in the context of determining whether the plaintiff has adequately pled a cause of action for defamation. *Lewis v. Kei*, 281 Va. 715, 725-726 (2011) .

3. Under the circumstances, a person who overheard Dr. Smith's accusations could reasonably believe that they were true.

With regard to the assignment of cross-error, the trial court concluded that the euthanasia statements were not mere hyperbole because, under the circumstances, "a listener could make the reasonable inference that Smith declared that Cashion made a deliberate decision with the anesthesia." (JA 242-243). To prevail on this issue, though, this Court would have to say that no reasonable listener could have understood Dr. Smith's statements to be the literal truth. That is, the defendants are right only if no reasonable inference could be drawn that Dr. Cashion, as a matter of fact, killed the patient. *Yeagle v. Collegiate Times*, 255 Va. 293, 296 (1998). As the trial court correctly decided, the circumstances of the patient's contemporaneous death, Dr. Smith's opportunity to know Dr. Cashion's care of the patient, the angry and serious nature of Dr. Smith's delivery of the accusation, and Dr. Cashion's control of the patient's vital functions and anesthesia, make such an inference not only reasonable, but natural. Under these circumstances, Dr. Smith's charge was not just a silly exaggeration that could be easily dismissed by a casual listener.

The defendants reach quite far to avoid the trial court's legally sound and sensible conclusion on this point. Ironically, Carilion suggests that no reasonable person could believe Dr. Smith's false charge that Dr. Cashion

killed the patient because it was so obvious that the patient was "gravely injured" and "had little chance of surviving in the first place." (Br. of Appellee Carilion, p.33-34). But the patient's dire condition proves Dr. Cashion's point that this was a bad faith, malicious and baseless statement that deserves no constitutional protection. Nor does it make sense on the question of hyperbole. Even if the patient had little chance of surviving, a listener could reasonably conclude that Dr. Smith meant it when he said – contemporaneous with the patient's death and outside the operating room – that Dr. Cashion, who controlled the patient's vital signs, respiratory function and consciousness, killed him.

The fact that there were other health care providers in the room at the time that Dr. Cashion was treating the patient is of no moment. Malpractice and killing occur when others are present, and if Dr. Cashion had done what Dr. Smith charged, it could have been done without attracting attention.

In arguing that Dr. Smith's euthanasia statements are mere hyperbole, the defendants also recast Dr. Smith's statements in a different light, describing them as merely addressing Dr. Cashion's "lackluster resuscitative efforts" (*E.g.*, Br. of Appellee Dr. Smith, p.35) or "failure to provide zealous treatment." (*E.g.*, Br. of Appellee Carilion, p.27). But that

is not what Dr. Smith said. Rather, he openly accused Dr. Cashion of killing the patient. It is this statement, not Dr. Smith's after-the-fact recharacterization of it, that must be examined. There is no constitutional protection for falsely accusing Dr. Cashion of killing this patient.

CONCLUSION

Comments that voice good faith concerns about the care of the patient might enjoy constitutional protection, but Dr. Smith's statement fell far below this standard of good faith and decency. He did not engage Dr. Cashion in a good faith, professional discussion about the patient's care, but instead, blamed the patient's death on Dr. Cashion's intentional misconduct. Dr. Smith crossed the line of constitutionally permissible speech, and a jury should decide whether he is liable for the damages this has caused Dr. Cashion.

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CERTIFICATE OF SERVICE

In compliance with Rule 5:26, I hereby certify:

On May 17, 2013, the correct number of true and accurate copies of this Reply Brief were filed with the Supreme Court of Virginia by certified mail, and the correct number of copies have been served upon counsel for the appellees by first-class mail. Electronic copies were delivered to both the court and opposing counsel via email this same day.

Monica Taylor Monday
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