In The

# Supreme Court of Virginia

**RECORD NO. 121797**

## BRADLEY J. CASHION, M.D.,

*Appellant,*

**v.**

## ROBERT S. SMITH, M.D. and CARILION MEDICAL CENTER,

*Appellees.*

## BRIEF OF APPELLEE

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## STATEMENT OF THE CASE

### The Amended Complaint

Bradley J. Cashion, M.D. ("Dr. Cashion"), filed this defamation action against Robert Stephen Smith, M.D. ("Dr. Smith"). In an Amended Complaint (J.A. 1-14), Dr. Cashion joined as a defendant Carilion Medical Center ("Carilion"). Dr. Cashion alleged that on November 19, 2009, Dr. Smith, acting as Carilion's employee, made a series of statements which were critical of the care Dr. Cashion provided an injured hospital patient. (J.A. 6-7). Dr. Cashion charged Dr. Smith's statements were libelous and defamatory per se. (J.A. 11-12). Dr. Smith and Carilion filed Demurrers and Pleas in Bar in response to the Amended Complaint. (J.A. 17-21; 23-26).

### The Demurrer Ruling

The circuit court sustained defendants' Demurrers in part and overruled them in part. In a letter opinion dated December 8, 2010, the court held all but one group of the alleged statements in issue were constitutionally protected expressions of opinion rather than actionable statements of purported fact. (J.A. 63-67). The court, however, held that statements ascribed to Dr. Smith concerning euthanasia were assertions of

fact and potentially defamatory per se. The court below also ruled that Dr. Smith's affirmative defense of qualified privilege could not be resolved on demurrer. (J.A. 66-67). Dr. Cashion's claim that Dr. Smith had accused him of euthanasia thus withstood demurrer in an Order on January 20, 2011 (J.A. 60-61).

The Summary Judgment Ruling

At the close of discovery, Dr. Smith and Carillon moved for summary judgment. (J.A. 95-98; 139-40). Defendants relied on the Amended Complaint and Dr. Cashion's Responses to Carilion's First Requests for Admissions (J.A. 100-119; 191-204). Defendants urged the court to find that the remaining alleged statement in issue – "You just euthanized my patient" – was rhetorical hyperbole and therefore not defamatory. Alternatively, defendants moved for summary judgment on the ground that Dr. Smith's purported comment was privileged.

Dr. Cashion responded by relying upon his Amended Complaint. (J.A. 142-57). Dr. Smith's alleged remark about euthanasia was neither rhetorical hyperbole nor qualifiedly privileged, Dr. Cashion argued.

On July 6, 2012, the court issued a letter opinion granting Dr. Smith and Carilion summary judgment. (J.A. 241-44). Analyzing the summary

judgment record, the court concluded the statement, "You just euthanized my patient," was not necessarily rhetorical hyperbole as a matter of law. (J.A. 243). The court nonetheless agreed with defendants that the alleged euthanasia statement was privileged. After considering the parties' respective "arguments, pleadings and supporting attachments," the court held that no evidence of malice sufficient to overcome the qualified privilege existed in the summary judgment record. (J.A. 243). The court incorporated these conclusions into a Final Order on July 23, 2012. (J.A. 238-40). The court subsequently declined Dr. Cashion's request that it reconsider its Final Order. (J.A. 257). Dr. Cashion then noted an appeal. (J.A. 258-59).

On February 25, 2013, the Supreme Court of Virginia awarded Dr. Cashion an appeal on his assignments of error. The Court also awarded Dr. Smith and Carilion an appeal on their cross-assignments of error. (J.A. 262-63).

## ASSIGNMENT OF CROSS-ERROR

> The Circuit Court Erred In Denying Carilion's Motion For Summary Judgment On The Ground That Dr. Smith's Statements Allegedly Containing The Word "Euthanasia" Were Not Rhetorical Hyperbole As A Matter [sic]. This Is Particularly True Where The Context Of The Statements And The Allegations Of The Amended Complaint Made Clear That The

Patient Died Of His Severe Injuries And Where The Hyperbolic Statements Were Made In The Wake Of A Stressful And Unsuccessful Surgery.[1]

## STATEMENT OF FACTS

This is a case about an emotional exchange between a hospital's chief trauma surgeon and the anesthesiologist assigned to assist him operate on a patient who was rapidly losing blood as a result of an accident.

### The Parties

Dr. Smith was Carilion's chief trauma surgeon in November 2009. Dr. Cashion is an anesthesiologist who worked at Carilion. Dr. Cashion's employer, Anesthesiology Consultants of Virginia, Inc. ("ACV"), was Carilion's exclusive provider of anesthesiology services. (J.A. 2-3).

Significantly, no ill will existed between Dr. Cashion and Dr. Smith prior to November 19, 2009. Indeed, the two physicians had no professional or personal relationship. (J.A. 127). The source of their discord on November 19, 2009, was the medical emergency presented by the arrival at Carilion's trauma bay of a patient whose lacerated liver was hemorrhaging blood.

[1] Preserved at (J.A. 19, 62, 107-11, 139, 194, 225-27, 239, 271-72 and 305-06).

## The Patient

On the evening of November 19, 2009, an intoxicated pedestrian walking along Interstate 81 in Wythe County, Virginia, was knocked senseless by a fast moving tractor trailer. The injured man ("the Patient") was transported by ground from a local emergency room to Carilion's trauma center 75 miles north in Roanoke. (J.A. 3).

Dr. Cashion and Dr. Smith were both at the Roanoke trauma center that evening. They provided emergency care for the Patient as part of a trauma team led by Dr. Smith. The Patient died after several hours of treatment in Carilion's operating room. (J.A. 5).

## Dr. Smith's Oral Criticism of Dr. Cashion's Resuscitative Efforts

Dr. Smith became upset when Dr. Cashion resisted his orders to transfuse crucial blood products and coagulants into the critically ill Patient. While the trauma team remained assembled in the operating room, Dr. Smith voiced the following criticisms of the anesthesiologist.

- "He [the Patient] could have made it with better resuscitation."
- "You determined from the beginning that he wasn't going to make it and purposefully didn't resuscitate him."
- "This was a very poor effort."
- "You didn't really try."
- "You gave up on him."

(J.A. 6).

In a hallway outside the operating room Dr. Smith and Dr. Cashion argued about the quality of the plaintiff's resuscitative efforts. Dr. Cashion alleges in his Amended Complaint that Dr. Smith at some point stated, "You just euthanized my patient." (J.A. 6).

A few minutes later, in ACV's office at Carilion, Dr. Smith made other comments comparing Dr. Cashion's resuscitative services that evening to passive euthanasia. James Crawford, M.D. ("Dr. Crawford"), an ACV principal who doubles as chief of anesthesiology at Carilion, was present during this argument between the parties. (J.A. 6-7).

A short while later on the same date, November 19, 2009, both Dr. Smith and Dr. Cashion memorialized their recollection of the events which climaxed in the Patient's death.

Dr. Smith's Written Criticisms of Dr. Cashion's Resuscitative Efforts

Dr. Smith reduced to writing his strong concerns about Dr. Cashion's passive approach to the Patient. (J.A. 8-9). In an e-mail to two Carilion officials, Dr. Smith listed examples of Dr. Cashion's withdrawal of care.

- Dr. Cashion loudly announced to the OR staff on several occasions while the patient was still alive that the trauma teams' efforts to save him were futile.

- At one point, Dr. Cashion wanted to declare the patient dead based on a radial arterial line reading even though the patient still demonstrated EKG activity and a palpable carotid pulse.
- Dr. Cashion refused to administer a coagulant Dr. Smith had ordered for the patient known as Factor VII (or "NovoSeven"), stating that the drug should be used on others.
- Dr. Cashion failed to give the patient all available blood products (such as platelets and plasma) and stated he wanted to preserve these life saving resources for others.
- Dr. Cashion failed to administer any pharmacologic agents at any point to support the patient's hemodynamic status.

(J.A. 120; 135-36).

Dr. Cashion's Written Criticisms of Dr. Smith

A comparison of the e-mail summarized above from Dr. Smith with Dr. Cashion's memorandum written the same date underscores the absence of any genuine disputes about the material facts surrounding the Patient's condition and progress in Carilion's operating room.

In his memorandum of November 19, 2009, Dr. Cashion recounted his repeated suggestions that resuscitation should be terminated even though the Patient remained alive. Dr. Cashion acknowledged that he vocalized his opinion that continued resuscitation was medically unnecessary in view of the accident victim's dismal chances of recovery. (J.A. 121; 137-38).

Dr. Smith in his e-mail wrote that the anesthesiologist wanted to declare the patient dead " . . . based on a radial arterial line reading while both EKG activity and a palpable carotid pulse were present." (J.A. 120; 135-36). Dr. Cashion for his part admitted that he indeed recommended declaring the patient dead despite the injured man's continued EKG activity. Dr. Cashion claimed that he changed his position and no longer favored a declaration of death when he subsequently felt a weak carotid pulse. (J.A. 121; 137-38).

One of Dr. Smith's central criticisms was that Dr. Cashion had refused the surgeon's direct order to administer Factor VII (also known as "NovoSeven") to the Patient. Dr. Cashion in his memorandum confirmed that he disagreed with Dr. Smith's Factor VII directive. (J.A. 121; 137-38). Dr. Cashion admitted that despite this instruction, he never administered any Factor VII to the Patient. (J.A. 121-22).

Along with admitting that he resisted Dr. Smith's order to administer Factor VII, Dr. Cashion acknowledged that he repeatedly questioned the

surgeon's unequivocal instructions to transfuse platelets and other vital blood products into the patient. (J.A. 121; 137-38).[2]

## ARGUMENT

## Standard of Review

### A. Dr. Cashion's Assignments of Error.

Dr. Cashion assigns error to two rulings below. In his first assignment of error, Dr. Cashion assails the circuit court's ruling sustaining defendants' demurrers to the allegedly defamatory statements recited in paragraph 29 of the Amended Complaint. Assuming, arguendo, the circuit court's ruling on defendants' Demurrers has been properly preserved for appeal, it is examined de novo. On demurrer, all factual allegations in the plaintiff's complaint are taken as true. A plaintiff's legal allegations, in contrast, are

[2] Dr. Cashion argued below both that Dr. Smith denied making the euthanasia comment and that he also admitted it was "false." (J.A. 331-32). Dr. Cashion cited Dr. Smith's deposition for this purpose, (J.A. 163-73), but cut off his answer. The rest of Dr. Smith's transcribed answer was introduced into the summary judgment record for the sake of completeness without objection. (J.A. 205-06). The deposition indicates Dr. Smith did not make the euthanasia comment attributed to him. But his comment that Dr. Cashion's proposed actions and inactions (e.g., failure to give blood products, declaring the patient dead when he had a pulse) "bordered on passive euthanasia" indeed was designed to jolt Dr. Cashion into performing more zealously. (J.A. 168). Dr. Smith never admitted believing his words were made in anything but good faith. (J.A. 168, 205-06).

not deemed true or accurate for purposes of demurrer. Abi-Najm v. Concord Condo., LLC, 280 Va. 350, 356-57, 699 S.E.2d 483, 486-87 (2010).

The second ruling which Dr. Cashion challenges on appeal is the circuit court's Final Order of July 23, 2012, granting defendants' summary judgment on privilege grounds. Summary judgment rulings are examined de novo on appeal. In reviewing a summary judgment record, all factual disputes are resolved in factor of the nonmoving party. Dudas v. Glenwood Golf Club, Inc., 261 Va. 133, 136, 540 S.E.2d 129, 131 (2001).

Whether a qualified privilege attached to a particular statement is a pure question of law for the court. Fuste v. Riverside Healthcare Assoc., Inc., 265 Va. 127, 132-33, 575 S.E.2d 858, 861 (2003). To overcome a qualified privilege on summary judgment, the plaintiff must come forward with clear and convincing evidence the defendant acted with common law malice. Id.

**B. Dr. Smith's Assignment of Cross-Error.**

Dr. Smith assigns as cross-error the lower court's rejection of his rhetorical hyperbole defense. (J.A. 243). This cross-error assignment is reviewed de novo on appeal. Whether a defamation defendant's statement

represented rhetorical hyperbole is a question of law for the court rather than the jury. Yeagle v. Collegiate Times, 255 Va. 293, 296, 497 S.E.2d 136, 137 (1998).

## I. THE COURT SHOULD REJECT DR. CASHION'S FIRST ASSIGNMENT OF ERROR, BOTH BECAUSE THIS ISSUE WAS NOT PRESERVED FOR APPEAL AND IN ANY EVENT THE STATEMENTS ALLEGED IN PARAGRAPH 29 OF THE AMENDED COMPLAINT WERE EXPRESSIONS OF OPINION.

### A. Dr. Cashion Waived The Right To Contest The Circuit Court's Demurrer Ruling.

In his first assignment of error, Dr. Cashion takes issue with the circuit court's Order of January 20, 2011. (J.A. 60-61). This assignment of error is foreclosed by VA. CODE ANN. § 8.01-384.A (LEXISNEXIS 2007 Replacement Volume).

Dr. Cashion forfeited his right to contest the Order of January 20, 2011. His counsel endorsed the Order under the declaration, "WE ASK FOR THIS." (J.A. 60-61). Counsel's endorsement was an express request that the Court enter the Order. By urging its entry, Dr. Cashion waived his right to attack the Order on appeal. VA. CODE ANN. § 8.01-384.A (LEXISNEXIS 2007 Replacement Volume).

B. Even Assuming, Arguendo, Dr. Cashion Did Not Waive The Right To Contest The Circuit Court's Demurrer Ruling, The Court Should Reject His First Assignment Of Error.

Even assuming, arguendo, Dr. Cashion retains the right to challenge the circuit court's Demurrer ruling, the Court should reject his first assignment of error. The subjects of that first assignment of error are the criticisms which Dr. Cashion alleges Dr. Smith leveled at him on November 19, 2009. (J.A. 6).

In its letter opinion of December 8, 2010, the circuit court concluded these statements were not actionable. The remarks were expressions of medical opinion, the court below held. (J.A. 65-66). Dr. Cashion now contends the lower court erred in classifying these criticisms as opinion rather than statements of purported fact. (Dr. Cashion Brief, pp. 12-17). The Court should affirm the circuit court's ruling that the five statements quoted above were constitutionally protected speech.

Whether a particular statement represents opinion or fact is a question of law for the Court. Raytheon Technical Services Co. v. Hyland, 273 Va. 292, 303, 641 S.E.2d 84, 91 (2007) ("Hyland I"); Hyland v. Raytheon Technical Services Co., 277 Va. 40, 47, 670 S.E.2d 746, 750

(2009) ("Hyland II"); WJLA-TV v. Levin, 264 Va. 140, 152, 564 S.E.2d 383, 390 (2002).

Expressions of opinion are protected speech under the First Amendment to the United States Constitution and Article I, Section 12 of the Virginia Constitution. *Hyland II*, 277 Va. at 47, 670 S.E.2d at 750 ("Expressions of opinion . . . are constitutionally protected and are not actionable as defamation."); Williams v. Garraghty, 249 Va. 224, 233, 455 S.E.2d 209, 215 (1995).

Applying these constitutional principles, the Supreme Court of Virginia has explained that a defendant's statements are unassailable expressions of opinion if they fall into either of two categories. First, " '[s]tatements that are relative in nature and depend largely upon the speaker's viewpoint are expressions of opinion.' " *Hyland I*, 273 Va. at 303, 641 S.E.2d at 90 (quoting *Fuste*, 265 Va. at 132, 575 S.E.2d at 861). Second, " '[s]peech that does not contain a provably false factual connotation' " is protected as " 'pure expressions of opinion.' " *Hyland I*, 273 Va. at 303, 641 S.E.2d at 90 (quoting *Levin*, 264 Va. at 156, 564 S.E.2d at 392.)

The case at bar involves two physicians criticizing one another's treatment of their shared patient during a medical emergency. Dr. Smith's alleged criticisms were constitutionally protected opinion, particularly since they all concerned the inexact science of emergency medicine. See Woodward v. Weiss, 932 F.Supp. 723, 726 (D.S.C. 1996); Aroonsakul v. Shannon, 279 Ill. App. 3d 345, 353, 664 N.E.2d 1094, 1100 (1996) appeal denied 671 N.E.2d 726.

Whether the parties' deceased Patient would have survived with "better" or different forms of resuscitation (J.A. 6) was a subjective, qualitative judgment call. Equally subjective was Dr. Smith's purported criticism that the anesthesiologist made a "very poor effort," "didn't really try" and "gave up on" the patient. (J.A. 6). These and other critical judgments or assessments Dr. Smith may have yelled across the operating table were not assertions of fact. Criticisms such as these cannot be objectively verified or refuted through "empirical proof." *Hyland I*, 273 Va. at 304, 641 S.E.2d at 91; Snyder v. Phelps, 580 F.3d 206, 219 (4th Cir. 2009) (explaining that a "statement not subject to objective verification is not likely to assert actual facts."). The trial court, then, correctly concluded

the statements attributed to Dr. Smith in paragraph 29 of the Amended Complaint are not actionable.

## II. THE COURT SHOULD REJECT DR. CASHION'S SECOND ASSIGNMENT OF ERROR BECAUSE DR. SMITH'S SPEECH WAS PRIVILEGED.

In his second assignment of error, Dr. Cashion challenges the circuit court's grant of summary judgment to Dr. Smith and Carilion in its Final Order of July 23, 2012. Dr. Cashion argues as a threshold matter that no qualified privilege attached to the euthanasia comments he attributes to Dr. Smith. Alternatively, Dr. Cashion intones, even if these statements were protected by a qualified privilege, the court below nevertheless erred in concluding he could not overcome that privilege at trial. (J.A. 17-25). Neither rationale for reversal has merit.

### A. A Qualified Privilege Attached To Dr. Smith's Alleged Euthanasia Comments.

A communication is qualifiedly privileged when it is made among persons who share an interest or duty in the subject matter.

> Communications between persons on a subject in which the persons have an interest or duty are occasions of privilege.

Larimore v. Blaylock, 259 Va. 568, 572, 528 S.E.2d 119, 121 (2000).

Accord, Union of Needletrades, Industrial and Textile Employees v. Jones, 268 Va. 512, 519, 603 S.E.2d 920, 924 (2004).

In his Opening Brief of Appellant, Dr. Cashion argues the circuit court erred by ruling Dr. Smith's euthanasia comments were qualifiedly privileged as a matter of law. Dr. Cashion asserts that a qualified privilege attaches only to communications made in good faith. In Dr. Cashion's view, whether Dr. Smith made his euthanasia comments in good faith so that a qualified privilege attached is a jury issue. (Dr. Cashion Brief, pp. 18-19).

Dr. Cashion misapprehends the Virginia law of defamation. Whether a qualified privilege attached to a defendant's statements is a pure question of law for the trial court. It is not a question of fact for the jury. *Fuste*, 265 Va. at 132-33, 575 S.E.2d at 861.

The purportedly defamatory communications at issue here were plainly privileged. The alleged presence of Dr. Crawford and Sherry Zwart, R.N., reinforces the privileged nature of Dr. Smith's comments about their patient. These colleagues had strong interests and duties concerning the Patient's medical condition and hospital care. Ms. Zwart was a registered nurse who directly participated in the Patient's care in the operating room. (J.A. 30). Dr. Crawford was Dr. Cashion's partner at ACV, which provides

anesthesiological care to Carilion patients pursuant to an exclusive contract. Dr. Crawford also is chief of anesthesiology at Carilion. (J.A. 6). In that dual capacity, Dr. Crawford necessarily had a strong interest in the care provided by one of his anesthesiologists to a Carilion patient. The communication in controversy, then, was qualifiedly privileged. Dr. Cashion's claim to the contrary is uncommonly silly.

B. The Circuit Court Correctly Held That Dr. Cashion Is Unable To Overcome The Qualified Privilege With Clear And Convincing Evidence.

To withstand defendants' Motions for Summary Judgment, Dr. Cashion was required to identify clear and convincing in the record that Dr. Smith abused the qualified privilege. Jackson v. Hartig, 274 Va. 219, 232, 645 S.E.2d 303, 310 (2007) (granting defendant summary judgment in defamation action because record lacked clear and convincing evidence of actual malice). Clear and convincing evidence is a significantly greater quantum of proof than a simple preponderance. Oberbroeckling v. Lyle, 234 Va. 373, 379, 362 S.E.2d 682, 685 (1987) (defining clear and convincing evidence as "that degree of proof which produces in the mind of the trier of facts a firm belief or conviction upon the allegations sought to be established."). Because Dr. Cashion failed to point to clear and convincing

evidence of common law malice sufficient to extinguish the privilege, summary judgment for defendants was appropriate.

Overcoming a qualified privilege is difficult. A weighty presumption exists that the defendant did not speak with common law malice. Preston v. Land, 220 Va. 118, 121, 255 S.E.2d at 509, 511 (1979) ("Ordinarily, the law presumes malice from the use of defamatory or insulting words. But the presumption is the other way where the occasion of the publication is privileged, and the *onus* is then upon the plaintiff to prove malice in fact.") [internal quotations omitted].

When a qualified privilege attached to the defendant's allegedly defamatory statements, the plaintiff's burden is to prove common law malice as an essential element of the tort.

> Where defamatory words are uttered under a qualified privilege, they are actionable *only* when the plaintiff proves they were spoken with actual malice.

*Preston*, 220 Va. at 120, 255 S.E.2d at 511 [internal quotations omitted] [emphasis added].

The Supreme Court of Virginia repeatedly has reaffirmed that proof of common law malice is the exclusive way a defamation plaintiff can prevail in the face of a qualified privilege. In *Larimore*, 259 Va. at 568, 528 S.E.2d

at 119, for instance, the plaintiff was a University of Virginia professor who sued several defendants for defaming him to the Board of Visitors during the university's tenure evaluation process. The Court held that Larimore's sole method for overcoming the qualifiedly privileged character of the defendants' comments was by proving common law malice.

> In summary, we hold that Larimore's tenure application process was a privileged occasion and any defamatory statements communicated by the defendants to the Board of Visitors and members of the University administration were entitled to a qualified privilege which shields the defendants from liability *unless* a showing of malice is made by clear and convincing evidence. *Great Coastal Express*, 230 Va. at 154, 334 S.E.2d at 854.

*Larimore*, 259 Va. at 576, 528 S.E.2d at 123 [emphasis added].

Three years later, the Supreme Court of Virginia, in a case brought by physicians against a hospital, reiterated that to defeat a qualified privilege the plaintiff must prove " . . . that the defamatory statements were made maliciously." *Fuste*, 265 Va. at 134, 575 S.E.2d at 863 (citing *Larimore*, 259 Va. at 572, 528 S.E.2d at 121).

To establish common law malice in the defamation context, the plaintiff must demonstrate clear and convincing evidence that the defendant speaker was motivated by ill-will arising from an "independent occasion," i.e. a prior incident or pre-existing relationship with the plaintiff.

> . . . In this context, "actual malice" is "behavior actuated by motives of personal spite, or ill-will, independent of the occasion on which the communication was made."

*Union of Needletrades*, 268 Va. at 520, 603 S.E.2d at 924.

Accord, *Fuste*, 265 Va. at 134-35, 575 S.E.2d at 863 (same); Gazette v. Harris, 229 Va. 1, 18, 325 S.E.2d 713, 727 (1985) (same).

No evidence exists Dr. Smith harbored common law malice towards the plaintiff. Dr. Cashion admitted he and Dr. Smith had no personal or professional relationship of any kind. (J.A. 127-28). Dr. Cashion thus indisputably failed to rebut the strong presumption that Dr. Smith's heartfelt outburst was motivated by good faith concern for the Patient rather than common law malice.

Dr. Cashion on appeal claims a triable issue of fact exists even if the circuit court correctly found insufficient evidence of malice. According to Dr. Cashion, demonstrating the defendant spoke with common law malice is only one of several, alternative ways a plaintiff can overcome the qualified privilege. Summary judgment was inappropriate, Dr. Cashion insists, because jurors could find the privilege lost if they determined Dr. Smith's euthanasia comment was knowingly or recklessly false or somehow "outrageous." (Dr. Cashion Brief, pp. 24-25).

Dr. Cashion's argument that the summary judgment record contains sufficient evidence to overcome the qualified privilege is inconsistent with Virginia law in two respects. First, Dr. Cashion's claim that he may surmount the qualified privilege even in the absence of the requisite malice by proving Dr. Smith's speech was knowingly false, reckless or outrageous is substantively inconsistent with recent Supreme Court of Virginia precedent. Second, even assuming, arguendo, a plaintiff could overcome the privilege in the absence of common law malice on the defendant's part, the circuit court's summary ruling would remain sound. Dr. Cashion fails to identify in the summary judgment record clear and convincing evidence that Dr. Smith knowingly spoke falsely, recklessly or outrageously when he upbraided the anesthesiologist for his less than vigorous efforts to resuscitate the fatally injured Patient.

1. A plaintiff can overcome a qualified privilege only by proving common law malice.

*Union of Needletrades*, 268 Va. at 519, 603 S.E.2d at 924 forecloses Dr. Cashion's argument that he can overcome the qualified privilege even without proving Dr. Smith's speech was motivated by common law malice. In *Union of Needletrades*, at id., the Supreme Court of Virginia clarified that the common law malice test is stricter than the *New York Times* malice

standard which applies when the defendant is a member of the commercial media. Proof the defendant either knew the statements in issue were false or published the statement with reckless indifference to the truth satisfies the *New York Times* malice standard. But the *Union of Needletrades* Court made clear that knowing falsity or reckless disregard for the truth is insufficient by itself to demonstrate the exacting level of common law malice (or "malice in fact") necessary to defeat a qualified privilege.

> Within the context of defamation law, there is also an intermediate standard between simple negligence and actual malice, sometimes referred to as "New York Times malice," wherein the plaintiff need show only that the statement was made with knowledge that it was false or with a reckless disregard for the truth, even if the defendant bore no ill-will toward the plaintiff. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964); *Great Coastal Express, Inc. v. Ellington*, 230 Va. 142, 149, 334 S.E.2d 846, 851 (1985).

*Union of Needletrades*, 268 Va. at 519, 603 S.E.2d at 924 and n. 4.

See *Larimore*, 259 Va. at 573, 528 S.E.2d at 121 (explaining that in determining whether the defendant spoke with common law malice "the question is not as to the truth or falsity of the communication . . . .").

A correct application of recent Supreme Court of Virginia decisions on the level of malice necessary to overcome a qualified privilege is contained in Conley v. Town of Elkton, 190 Fed. Appx. 246, 2006 U.S. App. LEXIS

17864 (July 14, 2006 4th Cir.) (unpublished). The plaintiff there, Conley, sued the chief of a town police department and others for defamation. Conley alleged Chief Pullen and members of the Town Council had falsely accused him of conspiring to corrupt the police department. The district court awarded summary judgment to the defendants on the ground that Conley could not overcome the qualified privilege which attached to their statements. Conley v. Town of Elkton, 381 F.Supp.2d 514 (W.D. Va. 2005).

Affirming, the United States Court of Appeals for the Fourth Circuit held that under *Union of Needletrades*, 268 Va. at 519, 603 S.E.2d at 924 and n. 4, Conley could not overcome the qualified privilege by pointing only to evidence that Chief Pullen knew his accusations were false. Common law malice – unlike *New York Times* malice – requires more than knowledge of falsity. Common law malice requires compelling evidence of deep seated hostility on the defendant's part that arose from a prior occasion or pre-existing relationship.

> To overcome the qualified privilege in the employment context, the plaintiff cannot rely on merely showing the falsity of the communication; rather, he must establish that the communication was "inspired by malice." . . . Specifically, the plaintiff must establish common-law malice -- i. e., "behavior actuated by motives of personal spite, or ill-will, independent of

> the occasion on which the communication was made." *Union of Needletrades*, 603 S.E.2d at 924. . . .
>
> . . . As the district court concluded, Conley cannot simply rely on showing that Chief Pullen made the conspiracy accusation with the knowledge that it was false or with reckless disregard for the truth to overcome the qualified privilege in the employment context. *See Union of Needletrades*, 603 S.E.2d at 924 n. 4.

*Conley*, 190 Fed. Appx. at 254, 2006 U.S. App. LEXIS at 22 and n. 7.

Dr. Cashion all but concedes he cannot demonstrate Dr. Smith harbored common law malice towards him. Particularly since the two physicians had no prior relationship, no genuine dispute exists that evidence of common law malice is absent from the record. Dr. Smith's statements to Dr. Cashion did not reflect ill-will arising from a prior, "independent occasion." *Union of Needletrades*, 268 Va. at 520, 603 S.E.2d at 924; *Fuste*, 265 Va. at 134-35, 575 S.E.2d at 863.

Dr. Cashion's attempt to end run the common law malice requirement by arguing knowledge of falsity or reckless disregard for accuracy alone may overcome the qualified privilege improperly confuses the stringent test for common law malice with the less demanding *New York Times* malice standard. Summary judgment for Dr. Smith was the correct result because *New York Times* malice is insufficient to create a triable issue of fact.

2. Assuming, arguendo, knowledge of falsity or recklessness could overcome the qualified privilege even in the absence of common law malice, summary judgment was appropriate.

Even if Dr. Cashion were correct that a defendant who harbored no common law malice could forfeit a qualified privilege by knowingly or recklessly leveling false accusations, the Court should affirm the circuit court's summary judgment ruling. Dr. Cashion fails to explain how reasonable jurors on this record could find clear and convincing evidence that Dr. Smith's statements were in bad faith.

In a defamation action involving privileged communications the plaintiff cannot reach the jury by resting upon allegations in his complaint. The burden of proving the privilege lost rests on the plaintiff. *Preston*, 220 Va. at 121, 255 S.E.2d at 511. As a result, a plaintiff must point to actual evidence in the summary judgment record that the defendant abused the privilege. *Hartig*, 274 Va. at 229 and 232, 645 S.E.2d at 308 and 310 (explaining that plaintiff's failure to identify evidence in the summary judgment record "is fatal to [plaintiff's] attempt to meet his constitutional burden of establishing that [defendant] published the allegedly defamatory statements with actual malice."). Rosenberg v. Mason, 157 Va. 215, 249, 160 S.E.2d 190, 202 (1931) ("It is not sufficient in a case such as this that

the evidence be consistent with the existence of actual malice, or even that it raise a suspicion that the defendant might have been actuated by malice or a doubt as to his good faith. It must affirmatively prove the existence of actual malice"); see also Jafari v. Old Dominion Transit Management Company, 2012 U.S. Dist. LEXIS 180962 at *12-*14 (Dec. 20, 2012 E.D. Va.) (unpublished) ("[Plaintiff] can only defeat this qualified privilege by showing by clear and convincing evidence that the words were spoken with the requisite intent – in this case, common-law malice. . . . [Plaintiff] may not satisfy his burden merely by making unsupported, conclusory statements that [Defendant] acted with malice. . . . At summary judgment, the standard is different: the plaintiff cannot simply assert that malice exists, but must come up with evidence to prove its existence."); Taylor v. CNA Corp., 782 F.Supp.2d 182, 202-03 (E.D. Va. 2003) (granting summary judgment to defendants on defamation claim where plaintiff asserted malice but the "record provides no basis for a reasonable jury to make such a conclusion by th[e] elevated [clear and convincing] standard."); Hollander v. Cayton, 145 A.D.2d 605, 606, 536 N.Y.S.2d 790, 790 (1988) ("To overcome a defense of qualified privilege the plaintiff must make an evidentiary showing that the statements were published with actual malice .

. . . The mere conclusory allegations by the plaintiff herein that the statements were maliciously motivated is insufficient to defeat the claim of qualified privilege.”).

The circuit court quite reasonably concluded as a matter of law that Dr. Cashion had not satisfied this stringent “constitutional burden.” *Hartig*, 274 Va. at 232, 645 S.E.2d at 310. Dr. Smith had a factual (thus good faith) basis for criticizing Dr. Cashion’s passive approach to the Patient’s fatal injuries. In his memorandum of November 19, 2009, Dr. Cashion acknowledged suggesting more than once that the trauma team cease resuscitating the Patient with blood products and life saving medicines such as Factor VII. (J.A. 121; 137-38). The two physicians disagreed about whether these medical resources should be used to address the Patient’s critical injuries. Id. Dr. Smith’s philosophical differences with Dr. Cashion under the largely undisputed circumstances of this case are not clear and convincing evidence of bad faith.

Dr. Smith’s choice of audience for his comments was perfectly in keeping with the qualified privilege. When a defendant limits his communications to appropriate personnel within a business enterprise the privilege is reinforced rather than abused. Dwyer v. Smith, 867 F.2d 184,

195 (4th Cir. 1989) (applying Virginia law). Dr. Smith did not make a public statement to the media or even to Carilion personnel who lacked a direct interest in the Patient's life or death.

Dr. Cashion alleges Dr. Smith accused him of euthanizing the patient in two conversations on November 19, 2009. The first was in a private conversation between only the two parties in a hallway outside the operating room. During this two-party conversation, Dr. Smith addressed Dr. Cashion directly. (J.A. 6). Nurse Zwart and Dr. Crawford overheard the conversation because they stood in the hallway, Dr. Cashion alleges. Id. A qualified privilege is not lost when the only persons who hear the comments in controversy are bystanders. *Rosenberg*, 157 Va. at 248, 160 S.E.2d at 202 ("The evidence shows as a matter of law that the occasion was privileged; and the fact that Miss Lane accidently or casually may have happened to overhear what was said by Feldman to Mrs. Mason is not sufficient to deprive what was said of the protection of the privilege of the occasion.")

The second conversation in which Dr. Smith allegedly accused Dr. Cashion of euthanizing the patient took place a few minutes later in Dr. Crawford's office at the hospital. This was a three-way conversation

among Drs. Crawford, Cashion and Smith. (J.A. 6-7). As discussed supra, Dr. Crawford was Dr. Cashion's partner at ACV and Carilion's chief of anesthesiology. (J.A. 6). Dr. Crawford's keen interest in the sensitive subject of the Patient's course of treatment and demise is indisputable. Indeed as chief of anesthesiology at the hospital, Dr. Crawford had a *right* to hear Dr. Smith's criticisms of Dr. Cashion's resuscitative efforts that evening. Because Dr. Smith confined his comments to these two, highly interested anesthesiologists within Carilion's hospital, the circuit court correctly held that as a matter of law he did not abuse the qualified privilege. See *Dwyer*, 867 F.2d at 195 ("Viewing the evidence in the light most favorable to [plaintiff], it is clear that a reasonable juror could only conclude that the defendants were not acting with actual malice. . . the communications were limited to the appropriate personnel, further indicating a lack of actual malice.").

Finally, in his Opening Brief of Appellant, Dr. Cashion correctly emphasizes that a trial court may not ". . . view individual statements in isolation from all of the statements the defendants made [.]" (Dr. Cashion Brief, p. 14). Instead, a court must consider together all related statements the defendant made on the date he allegedly defamed the plaintiff. A court

may not focus on only one of the defendant's utterances and ignore the balance of his statements on the same subject on the same occasion. Lewis v. Kei, 281 Va. 715, 726, 708 S.E.2d 884, 891 (2011) ("In other words, in considering whether a plaintiff has adequately pled a cause of action for defamation, the court must evaluate all of the statements attributed to the defendant").

Here, Dr. Smith made both oral and written statements at Carilion's hospital on this privileged occasion (November 19, 2009). The oral statements were an "extreme verbal outburst" (Dr. Cashion Brief, p. 25). Dr. Smith in this outburst allegedly accused Dr. Cashion of euthanasia with respect to the Patient. (J.A. 6). Dr. Smith made his written statements "[t]hat same evening" (November 19, 2009). (J.A. 7). These were in a detailed e-mail, which Dr. Crawford received. (J.A. 135-36). Dr. Smith explained in his e-mail the specific, factual basis for any euthanasia comments he may have directed toward Dr. Cashion "that same evening." (J.A. 6; 135-36). This contemporaneous writing demonstrates Dr. Smith's criticisms of Dr. Cashion were grounded in emergency medicine rather than any species of malice.

Dr. Smith's evident good faith in criticizing Dr. Cashion to Dr. Crawford and other Carilion personnel is also reflected in the plaintiff's written response of the same date (November 19, 2009). Dr. Cashion acknowledged that he and Dr. Smith had debated whether the Patient should be resuscitated with hospital resources that the anesthesiologist argued should have been conserved for others. (J.A. 136-37). Debates between physicians about the best way to manage a medical emergency are protected speech. *Shannon*, 279 Ill. App. 3d at 353, 664 N.E.2d at 1100 ("Thus, it has been stated that a statement is incapable of a defamatory construction when the underlying subject matter is medical science, which is at best an inexact science in which numerous and widely varied philosophies and approaches exist and upon which there can be much debate and disagreement.").

No basis, then, exists in the summary judgment record for piercing the privileged nature of this argument between two treating physicians about the Patient's life or death. No reasonable juror could find the privilege

overcome by clear and convincing evidence. *Hartig*, 274 Va. at 232, 645 S.E.2d at 310.[3]

## III. THE CIRCUIT COURT ERRED BY FAILING TO FIND DR. SMITH'S ALLEGED EUTHANASIA COMMENTS WERE RHETORICAL HYPERBOLE AS A MATTER OF LAW. (Appellee's Assignment of Cross-Error).

In its letter opinion of July 6, 2012, the court below ruled the euthanasia statements alleged in the Amended Complaint were not as a matter of law rhetorical hyperbole. (J.A. 238-44). This was error. Even aside from their privileged character, the euthanasia comments attributed to Dr. Smith were hyperbolic. The rhetorical hyperbole doctrine provides an alternative, independent ground on which to affirm the circuit court's dismissal of this misguided defamation suit.

Like opinion, rhetorical hyperbole is protected speech under the First Amendment and Article I, Section 12 of the Virginia Constitution.

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[3] Unlike the case at bar, *Hartig*, 274 Va. at 228, 645 S.E.2d at 308, was brought against a commercial publisher. Therefore, the plaintiff's burden was to prove the defendant acted with so called *New York Times* malice, which requires only knowledge that the publication was false. The *New York Times* standard is less onerous than the common law malice test, which demands clear evidence of pre-existing ill-will. A plaintiff such as Dr. Cashion must prove common law malice when a qualified privilege protects a defendant who is not a member of the media, as discussed supra, *Union of Needletrades*, 268 Va. at 519, 603 S.E.2d at 924 and n. 4.

Hyperbole, no matter how offensive or insulting, cannot expose the speaker to liability.

> In considering the type of speech that falls beyond that which can support a defamation action, the United States Supreme Court has recognized that speakers may use language that is insulting, offensive, or otherwise inappropriate, but constitutes no more than "rhetorical hyperbole."

*Yeagle*, 255 Va. at 295-96, 497 S.E.2d at 137.

Whether a statement was inactionable hyperbole, rather than a false representation of purported fact, is a pure question of law which lies within the exclusive province of the court. Id. at 296, 497 S.E.2d at 138 (explaining that whether a statement is rhetorical hyperbole "is a matter for the trial judge to determine as a matter of law").

Rhetorical hyperbole is constitutionally protected because society as a whole benefits from impassioned debate about issues of pressing concern. See Milkovich v. Lorain Journal Co., 497 U.S. 1, 20-21 (1990) (observing that "loose, figurative, or hyperbolic language" is protected by the First Amendment to ensure "public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of our Nation"). Dr. Smith's angry outburst during his debate with Dr. Cashion was protected hyperbole because

proper management of critically injured accident victims in Virginia's emergency rooms is a pressing, public concern. *Shannon*, 279 Ill. App. 3d at 353, 664 N.E.2d at 1100 ("We believe that it is important to society that physicians be afforded an opportunity to express their opinions on debatable methods of treating patients.").

In evaluating whether a particular statement was rhetorical hyperbole, courts examine the "context and tenor" of the speech. *Phelps*, 580 F.3d at 224. Accusations hurled in the heat of debate or in the midst of an emergency such as the crisis that confronted Drs. Smith and Cashion fall squarely within the protective ambit of the rhetorical hyperbole doctrine. See Horsley v. Rivera, 292 F.3d 695, 700, 702 (11th Cir. 2002) (holding defendant Rivera's heated accusation that plaintiff Horsley was "an accomplice to murder," was not actionable because "it is clear from the record that Horsley and Rivera were engaged in an emotional debate concerning emotionally-charged issues of significant public concern. . . . When Rivera's statement is examined, as it must be, in its context of this debate, no reasonable viewer would have concluded that Rivera was literally contending that Horsley could be charged with a felony in connection with Dr. Slepian's murder."); Schnare v. Ziessow, 104 Fed.

Appx. 847, 851-52, 2004 U.S. App. LEXIS 14366 at *14 (4th Cir. 2004) (unpublished) ("A reasonable reader would therefore recognize this accusation of lying as just an expression of outrage") [internal quotations omitted]; Arthur v. Offit, 2010 WL 883745 at *5 (Mar. 10, 2010 E.D. Va.) [unpublished]; Rinsley v. Brandt, 700 F.2d 1304, 1309 (10th Cir. 1983).

Dr. Smith's euthanasia comments were made suddenly in anger. Dr. Cashion declares in his Opening Brief of Appellant, "This was an extreme verbal outburst." (Dr. Cashion Brief, p. 25). Dr. Smith's alleged exclamation that Dr. Cashion's lackluster resuscitative efforts amounted to euthanasia is precisely the type of excited or exaggerated expression that "negates any impression that the speaker is asserting actual facts." *Phelps*, 580 F.3d at 220; Greenbelt Cooperative Publishing Assoc. v. Bresler, 398 U.S. 6, 13 (1970) (holding accusation of "blackmail" was rhetorical hyperbole); Lewis-Gale Medical Center, LLC v. Alldredge, 282 Va. 141, 152, 710 S.E.2d 716, 721-22 (2011) (holding that hospital official's reference to emergency room physician as an "organizational terrorist" was hyperbole).

As discussed supra, Dr. Smith's "verbal outburst" on November 19, 2009, must be considered together with his written statement on the same

subject on the same date. *Lewis*, 281 Va. at 726, 708 S.E.2d at 892. In his written explanation on that date, Dr. Smith restated his still strongly held view that Dr. Cashion had provided unacceptable care to the Patient. (J.A. 135-36). Nowhere in that detailed recitation of his criticisms did Dr. Smith accuse Dr. Cashion of "euthanizing" the Patient. If Dr. Smith had meant to convey that his ACV colleague literally had "euthanized" the Patient, Dr. Smith would have made this charge in his written statement. The absence of any mention of "euthanasia" or "euthanize" in Dr. Smith's detailed, written complaint to Carilion of November 19, 2009, establishes that his use of one of those terms during his "extreme verbal outburst" (Dr. Cashion Brief, p. 25) was rhetorical hyperbole. The circuit court's conclusion to the contrary was erroneous. Summary judgment was the proper outcome regardless of whether Dr. Smith's comments were protected by the qualified privilege.

## CONCLUSION

For the foregoing reasons, the Court should affirm the circuit court's dismissal of this defamation action on the qualified privilege grounds stated in the lower court's Final Order. Alternatively, the circuit court's dismissal

of this action should be affirmed because the statements in issue were rhetorical hyperbole and therefore protected speech.

Respectfully submitted,

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## CERTIFICATE PURSUANT TO RULE 5:26(h)

I hereby certify that pursuant to Rule 5:26(h) of the Supreme Court of Virginia:

1. Fifteen bound copies, and one electronic copy on CD, of this foregoing Brief of Appellee were hand-filed with the Clerk of the Supreme Court of Virginia this 3rd day of May, 2013.

2. I further certify that on this same day, three bound copies, and one electronic copy of CD, of the same were served, via UPS Ground Transportation, on Counsel for the Appellant and Appellee:

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