IN THE

Supreme Court of Virginia

RECORD NO. 121797

BRADLEY J. CASHION,

Appellant,

v.

ROBERT S. SMITH, *et al.*,

Appellees.

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

ASSIGNMENTS OF ERROR 2

1. The trial court erred in sustaining Defendants' demurrer and finding that the following statements were statements of opinion that were not defamatory as a matter of law: "He 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." These statements contain provably false statements and are not opinion 2

2. The trial court erred in finding that Dr. Smith's statements were protected by a qualified privilege and in entering summary judgment in favor of the defendants on the qualified privilege 2

   a. The trial court erred in granting summary judgment on the qualified privilege because the issue whether the qualified privilege was lost or abused is a question of fact for the jury 2

   b. The trial court erred in granting summary judgment because the issue whether the defamatory statements were spoken in good faith is a question of fact for the jury 3

   c. The trial court erred in granting summary judgment because the issue whether there was malice is a question of fact for the jury ... 3

STATEMENT OF THE CASE 3

STATEMENT OF MATERIAL FACTS 6

The Amended Complaint 6

Requests for Admission 8

STANDARD OF REVIEW 9

1. Demurrer 9

2. Summary Judgment..... 10

ARGUMENTS AND AUTHORITIES ON ASSIGNMENTS OF ERROR..... 12

1. All the statements Dr. Smith made accusing Dr. Cashion of Substandard care or criminal conduct in the course of a medical procedure are actionable as defamation *per se* and are provably false 12

2. A qualified privilege did not attach to Dr. Smith's statements that Dr. Cashion euthanized the patient..... 17

3. Jury issues were presented on the questions whether the qualified privilege was lost or abused and whether it was defeated by a lack of good faith or the existence of malice..... 18

ARGUMENT AND AUTHORITIES ON ASSIGNMENTS OF CROSS-ERROR 26

4. The trial court correctly found that Dr. Smith's statement was not rhetorical hyperbole 26

CONCLUSION..... 29

CERTIFICATE OF SERVICE..... 31

TABLE OF AUTHORITIES

CASES

Abi-Najm v. Concord Condo., LLC,
280 Va. 350, 699 S.E.2d 483 (2010) 10

Aylor v. Gibbs,
143 Va. 644, 129 S.E. 696 (1925) 11, 19, 21

Carriers v. Austin,
418 U.S. 264, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974) 26

Crawford v. United Steel Workers, AFL-CIO,
230 Va. 217, 335 S.E.2d 828 (1985) 27

Dudas v. Glenwood Golf Club, Inc.,
261 Va. 133, 540 S.E.2d 129 (2001) 11

Fuste v. Riverside Healthcare Assoc., Inc.,
265 Va. 127, 575 S.E.2d 858 (2003) ..... passim

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974) 14

Great Coastal Express, Inc. v. Ellington,
230 Va. 142, 334 S.E.2d 846 (1985) ..... passim

Greenbelt Coop. Publ'g Ass'n, Inc. v. Bresler,
398 U.S. 6, 26 L. Ed. 2d 6, 90 S. Ct. 1537 (1970) 26

Hansen v. Stanley Martin Cos.,
266 Va. 345, 585 S.E.2d 567 (2003) 10

Hustler Magazine, Inc. v. Falwell,
485 U.S. 46, 99 L. Ed. 2, 41, 108 S. Ct. 876 (1988) 26

Hyland v. Raytheon Tech. Servs. Co.,
277 Va. 40, 670 S.E.2d 746 (2009) 12, 14, 15

Kurpiel v. Hicks,
284 Va. 347,731 S.E.2d 921 (2012) 9

Lewis v. Kei,
281 Va. 715, 708 S.E.2d 884 (2011) ..... passim

Lewis-Gale Med. Ctr., LLC v. Alldredge,
282 Va. 141, 710 S.E.2d 716 (2011) 27

Milkovich v. Lorain Journal Co.,
497 U.S. 1 (1990) 12, 26

Schnare v. Ziessow,
104 Fed. Appx. 847 (4th Cir. 2004) 26, 27

Slone v. General Motors Corp.,
249 Va. 520, 457 S.E.2d 51 (1995) 10

Smalls v. Wright,
241 Va. 52, 399 S.E.2d 805 (1991) ..... passim

Taylor v. Grace,
166 Va. 138, 184 S.E. 211 (1936) 11, 20

Tharpe v. Saunders,
___ Va. ___, 737 S.E.2d 890, *8 (2013) 10, 14

Yeagle v. Collegiate Times,
255 Va. 293, 497 S.E.2d 136 (1998) 12, 26, 27, 29

RULES

Va. Sup. Ct. R. 3:20 10

Va. Sup. Ct. R. 5:26 31

OPENING BRIEF

This is a defamation case involving two physicians. The defendant surgeon accused the plaintiff anesthesiologist of euthanizing a patient who died after an unsuccessful operation.

Drs. Smith and Cashion were involved in an emergency medical procedure of a critically ill patient. After the patient died, Dr. Smith accused Dr. Cashion of killing the patient. In a communication heard by others, Dr. Smith repeatedly stated that Dr. Cashion euthanized the patient. He also falsely accused Dr. Cashion of intentionally failing to resuscitate the patient, giving up on him, and giving a very poor effort. Dr. Smith also falsely claimed that the patient could have survived with better resuscitation efforts by Dr. Cashion.

On a demurrer, the trial court held that only the statements Dr. Smith made relating to euthanization were actionable. Finding that the other statements Dr. Smith made about Dr. Cashion were pure opinion, the trial court dismissed them.

Later, the trial court entered summary judgment for Dr. Smith. It held that, as a matter of law, the statements were subject to a qualified privilege and there was no evidence of malice to overcome the privilege. The trial court then summarily refused to allow a jury to decide the factual questions

whether Dr. Smith abused or lost the qualified privilege or made the statements in good faith.

The trial court's rulings are plainly erroneous. First, none of the statements Dr. Smith made were purely matters of opinion. Rather, they contained provably false statements. Second, the qualified privilege did not attach to Dr. Smith's statements. Finally, because the issues of malice, good faith, and loss or abuse of the qualified privilege are questions of fact, the trial court impermissibly decided as a matter of law issues reserved for the jury's consideration.

ASSIGNMENTS OF ERROR

1. **The trial court erred in sustaining Defendants' demurrer and finding that the following statements were statements of opinion that were not defamatory as a matter of law: "He could have made it with better resuscitation"; "This was a very poor effort"; "You didn't really try"; "You gave up on him"; and "You determined from the beginning that he wasn't going to make it and purposefully didn't resuscitate him." These statements contain provably false statements and are not opinion.**[1]

2. **The trial court erred in finding that Dr. Smith's statements were protected by a qualified privilege and in entering summary judgment in favor of the defendants on the qualified privilege.**

    a. **The trial court erred in granting summary judgment on the qualified privilege because the issue whether the qualified**

[1] Preserved at JA 11, 55-56, 282-285.

privilege was lost or abused is a question of fact for the jury.

b. **The trial court erred in granting summary judgment because the issue whether the defamatory statements were spoken in good faith is a question of fact for the jury.**

c. **The trial court erred in granting summary judgment because the issue whether there was malice is a question of fact for the jury.**[2]

STATEMENT OF THE CASE

Dr. Bradley J. Cashion filed a defamation suit against Dr. Robert S. Smith and his employer, Carilion Medical Center.[3] (JA 1). Dr. Cashion alleged that Dr. Smith made numerous defamatory statements after the two physicians participated in an unsuccessful medical procedure of a critically ill patient. Dr. Cashion is an anesthesiologist, and Dr. Smith is a trauma surgeon. Dr. Smith made the following statements about Dr. Cashion's care of the patient: "He [referring to 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"; "You just euthanized my patient." (JA 6, ¶29-32). Later, Dr. Smith again repeated –

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[2] Preserved at JA 57, 152-156, 209-210, 240, 245-252, 257, 285-289, 298, 332-346.

[3] The parties agreed to dismiss an additional defendant, Carilion Clinic Physicians, LLC. (JA 28-29).

in the presence of others – the accusation that Dr. Cashion had euthanized the patient. (JA 6-7 ¶31-33).

Defendants filed Pleas in Bar and Demurrers. (JA 17, 33). They asserted that Dr. Smith's statements were not defamatory and were subject to a qualified privilege. They specifically alleged that the statements were merely opinion, and that the court should "parse each of those allegedly defamatory, libel statements to determine whether, in fact, they have factual connotation." (JA 267; *see also* JA 268). The court ruled that the "euthanasia" statements made by Dr. Smith are actionable as defamation *per se*, but found that the remaining statements were simply matters of opinion that were not actionable. (JA 60-61, 65-66). The Court further found that there was a genuine dispute of fact regarding the issue of qualified privilege, and that "the issue of privilege is not available on demurrer." (JA 66).

Later, Defendants moved for summary judgment on grounds that the "euthanasia" statements were, as a matter of law, rhetorical hyperbole and subject to a qualified privilege with no disputed evidence of common law malice to overcome the privilege. (JA 95, 139). They based their motion on the Amended Complaint and Dr. Cashion's Responses to Carilion's First

Request for Admissions. (JA 101). Dr. Cashion opposed the motion. (JA 142, 208).

Following oral argument on the summary judgment motion, the court found that the communication was qualifiedly privileged, and that the privilege could not be overcome with common law malice. (JA 243). The Court found as a matter of law that the words were not spoken with malice. (*Id.*) However, the Court rejected the Defendants' argument that the "euthanasia" statement was rhetorical hyperbole. (JA 242).

On July 23, 2012, the Court entered a Final Order granting Defendants summary judgment and dismissing the case. (JA 238-239). Dr. Cashion objected, (JA 240), and moved for reconsideration because the trial court had impermissibly decided the factual issues of good faith, abuse of the privilege, and malice as a matter of law. (JA 245-252). The trial court denied the motion to reconsider without comment. (JA 257). This Court granted an appeal on all of Dr. Cashion's assignments of error and on the defendants' assignment of cross-error. (JA 262-263).

STATEMENT OF MATERIAL FACTS

The Amended Complaint

The allegations in the Amended Complaint must be examined because they formed the basis for the defendants' demurrers and motions for summary judgment. (JA 101). Those allegations established the following.

Dr. Cashion is an anesthesiologist employed by Anesthesiology Consultants of Virginia, Inc. ("ACV"). (JA 2). Dr. Smith is a trauma surgeon and vice-chair of the Department of Surgery. He is employed by Carilion Medical Center. (*Id.*). ACV contracted with Carilion to provide anesthesiology services. (*Id.* at 3).

On the evening of November 19, 2009, Dr. Cashion and Dr. Smith provided emergency care at Carilion's Roanoke Memorial Hospital to a critically injured patient who was a pedestrian struck by a tractor trailer on the interstate. (*Id.*). Due to delays in transport and delays at the Hospital, the patient arrived at the operating room three and a half hours after the accident. (*Id.*).

Dr. Cashion provided appropriate and reasonable care to the patient. (*Id.* at 6, 11). However, as a result of the patient's severe injuries and

errors by Carilion and its staff, attempts to resuscitate and save the patient were unsuccessful and he died. (*Id.* at 3-5).

At the conclusion of the medical procedure, Dr. Smith addressed Dr. Cashion in the populated operating room and, in a loud and aggressive manner, maliciously and falsely accused Dr. Cashion: "He [referring to 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"; and "You determined from the beginning that he wasn't going to make it and purposely didn't resuscitate him." (*Id.* at 6). Later, Dr. Smith launched another verbal assault against Dr. Cashion in the hallway outside the operating room. In a loud and aggressive manner, he stated that Dr. Cashion "just euthanized my patient." (*Id.*). This remark were heard by Dr. James J. Crawford, Chief of Anesthesia at Carilion Clinic and Nurse Zwart. (*Id.*). Even later, in the anesthesia office, Dr. Smith maliciously and falsely stated multiple times that Dr. Cashion had "euthanized" the patient and had committed "euthanasia." Dr. Crawford heard these remarks. (*Id.* at 6-7).

Later the same evening, Dr. Smith wrote a factually incorrect email communication regarding Dr. Cashion's operating room performance to various Carilion employees. (*Id.* at 7-8). Consistent with its policy of marginalizing non-Carilion employees, Carilion ratified Dr. Smith's

defamatory comments. (*Id.* at 8-9). Indeed, Carilion regularly supports its employees, including Dr. Smith, at the expense of other physicians and even the public. (*Id.* at 9-10).

Although Dr. Smith has been given several opportunities to apologize to Dr. Cashion, he has refused. (*Id.* at 8-10). After Dr. Cashion filed his complaint, Dr. Smith admitted that his statements were false. (*Id.* at 10-11). Dr. Cashion did try to resuscitate the patient and did not give-up on the patient. (*Id.* at 11).

Dr. Smith maliciously published false factual statements that harmed Dr. Cashion and his personal and professional reputation. (*Id.* at 11). Dr. Smith knew the statements were false, or lacked a reasonable basis to believe them, or acted negligently in failing to determine the facts on which his communication was based. (*Id.* at 12). Dr. Smith made these statements maliciously and with ill-will to discredit and injure Dr. Cashion, who is a non-Carilion physician. (*Id.*). Dr. Smith's defamatory statements have had a significant negative impact on Dr. Cashion's reputation with his professional colleagues and others in the community. (*Id.* at 10).

Requests for Admission

In response to the Defendants' requests for admissions, Dr. Cashion admitted that "a physician should engage in *lawful* communication with

other physicians and nurses concerning the care or treatment of a patient when the physician and other healthcare providers are caring for the same patient in the same room." (*E.g.*, JA 125, Response 26).

The Defendants' requests for admission also addressed the issue of malice. Dr. Cashion admitted only that, before November 19, 2009, he did not believe, based on Dr. Smith's words or actions, that Dr. Smith disliked him or had any disagreement or conflict with him, hated him, had personal spite towards him, or desired to injure him personally or professionally, or wanted revenge against him. (JA 127-129, Responses 32-36). He did not admit that there was no evidence of malice, ill-will or spite. Further, Dr. Cashion denied that, before November 19, 2009, he had reason to believe that Dr. Smith had ill-will towards him, personally or professionally. (JA 127-128, Response 33). Dr. Cashion admitted that ACV had a contract with Carilion to be the exclusive source of anesthesiologists. (JA 131, Response 44).

STANDARD OF REVIEW

1. Demurrer

The trial court's decision to grant a demurrer involves issues of law and is therefore reviewed *de novo*. *Kurpiel v. Hicks*, 284 Va. 347, 353, 731

S.E.2d 921, 925 (2012); *Abi-Najm v. Concord Condo., LLC*, 280 Va. 350, 356-57, 699 S.E.2d 483, 486-87 (2010). The principles governing review of a demurrer are well-settled:

> The purpose of a demurrer is to determine whether a [complaint] states a cause of action upon which the requested relief may be granted. A demurrer tests the legal sufficiency of facts alleged in pleadings, not the strength of proof. Accordingly, we accept as true all properly pled facts and all inferences fairly drawn from those facts.

Kurpiel, 284 Va. at 353, 731 S.E.2d at 925. Whether an allegedly defamatory statement is one of fact or opinion is a question of law. *Lewis v. Kei*, 281 Va. 715, 725, 708 S.E.2d 884, 891(2011); *Fuste v. Riverside Healthcare Assoc., Inc.*, 265 Va. 127, 132-33, 575 S.E.2d 858, 861 (2003). On review, the appellate court does not decide whether that statement is true or false, "but whether it is capable of being proved true or false." *Tharpe v. Saunders*, ___ Va. ___, ___, 737 S.E.2d 890, *8 (2013).

2. Summary Judgment

"Summary judgment shall not be entered if any material fact is genuinely in dispute." Rule 3:20. Accordingly, "'the decision to grant a motion for summary judgment is a drastic remedy.'" *Hansen v. Stanley Martin Cos.*, 266 Va. 345, 351, 585 S.E.2d 567, 571(2003) (quoting *Slone v. General Motors Corp.*, 249 Va. 520, 522, 457 S.E.2d 51, 52 (1995)). In considering the record of the parties' pleadings and requests for admission,

the court accepts as true "'those inferences from the facts that are most favorable to the nonmoving party, unless the inferences are forced, strained, or contrary to reason.'" *Id.* (quoting *Dudas v. Glenwood Golf Club, Inc.*, 261 Va. 133, 136, 540 S.E.2d 129, 131 (2001)).

The question whether a statement is privileged is a question of law. *Fuste*, 265 Va. at 135, 575 S.E.2d at 863; *Smalls v. Wright*, 241 Va. 52, 55-56, 399 S.E.2d 805, 807-08 (1991); *Great Coastal Express, Inc. v. Ellington*, 230 Va. 142, 153-54, 334 S.E.2d 846, 853-54 (1985). The question whether a qualified privilege has been lost or abused, was made in good faith or was malicious is a question of fact. *Fuste*, 265 Va. at 135, 575 S.E.2d at 863 (malice and loss or abuse of the privilege); *Smalls*, 241 Va. at 55-56, 399 S.E.2d at 807-08 (loss or abuse of the privilege); *Taylor v. Grace*, 166 Va. 138, 144-46, 184 S.E. 211, 213-14 (1936) (malice); *Aylor v. Gibbs*, 143 Va. 644, 647 and 654, 129 S.E. 696, 697 and 699 (1925) (good faith).

ARGUMENT AND AUTHORITIES ON ASSIGNMENTS OF ERROR

1. All the statements Dr. Smith made accusing Dr. Cashion of substandard care or criminal conduct in the course of a medical procedure are actionable as defamation *per se* and are provably false.

"In order to assert a claim of defamation, the plaintiff must first show that a defendant has published a false factual statement that concerns and harms the plaintiff or the plaintiff's reputation." *Lewis v. Kei*, 281 Va. 715, 726, 708 S.E.2d 884, 892 (2011); *Hyland v. Raytheon Tech. Servs. Co.*, 277 Va. 40, 46, 670 S.E.2d 746, 750 (2009). "The plaintiff also must show that the defendant knew that the statement was false, or, believing that the statement was true, lacked a reasonable basis for such belief, or acted negligently in failing to determine the facts on which the publication was based." *Lewis*, 281 Va. at 726, 708 S.E.2d at 892. However, the United States "Supreme Court has specifically declined to hold that statements of opinion are categorically excluded as the basis for a common law defamation action." *Yeagle v. Collegiate Times*, 255 Va. 293, 295, n.1, 497 S.E.2d 136, n.1 (1998) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-21 (1990)).

Further, defamatory statements may be made by implication, inference or insinuation. *Fuste v. Riverside Healthcare Assoc., Inc.,* 265 Va. 127, 132, 575 S.E.2d 858, 861 (2003).

The trial court correctly held that the statements Dr. Smith made about Dr. Cashion's care of the patient were defamatory *per se*. (JA 65). They accused Dr. Cashion of committing a crime and caused prejudice to him in his profession. *See, e.g., Fuste*, 265 Va. at 132, 575 S.E.2d at 861(statements that plaintiff physicians "abandoned" their patients and that there were "concerns about their competence" prejudiced the doctors in the practice of their profession).

In partially granting the defendants' demurrer, the trial court ruled as a matter of law that all of the accusations Dr. Smith leveled at Dr. Cashion – except the statements explicitly accusing him of euthanizing the patient – were opinions. (JA 65-66). In addition to the accusation that Dr. Cashion euthanized the patient, Dr. Smith also said: "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." The trial court summarily concluded that these comments "indicate Dr. Smith's

medical critiques of Dr. Cashion and are opinions which do not state actual facts." (JA 66). The court was wrong.

Although pure expressions of opinion are not actionable as defamation, statements of fact plainly are because "'there is no constitutional value in false statements of fact.'" *Tharpe v. Saunders*, ___ Va. ___, ___, 737 S.E.2d 890, *7 (2013) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)); *Hyland*, 277 Va. at 47, 670 S.E.2d at 750. Actionable statements of fact contain provably false facts. *Lewis*, 281 Va. at 725, 708 S.E.2d at 891; *Hyland*, 277 Va. at 47, 670 S.E.2d at 750. By contrast, "'[w]hen a statement is relative in nature and depends largely on a speaker's viewpoint, that statement is an expression of opinion. Factual statements made in support of an opinion, however, can form the basis for a defamation action.'" *Lewis*, 281 Va. at 725, 708 S.E.2d at 891 (quoting *Hyland*, 277 Va. at 47, 670 S.E.2d at 751).

"In determining whether a statement is one of fact or opinion, a court may not isolate one portion of the statement at issue from another portion of the statement. Rather, a court must consider the statement as a whole." *Hyland*, 277 Va. at 47, 670 S.E.2d at 751 (internal citation omitted). Nor may the court view individual statements in isolation from all of the statements the defendants made:

> 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 and determine whether, taken as a whole, a jury could find that defendant knew or should have known that the factual elements of the statements were false and defamatory.

Lewis, 281 Va. at 725-26, 708 S.E.2d at 891-92. "Thus, the factual portions of an allegedly defamatory statement may not be evaluated for truth or falsity in isolation, but must be considered in view of any accompanying opinion and other stated facts." *Hyland*, 277 Va. at 48, 670 S.E.2d at 751.

Here, the trial court's conclusion that the non-euthanasia statements were merely opinion is wrong for at least three reasons. First, Dr. Cashion alleged that these communications contained factual statements that were false, (JA 11, ¶58-59), and on demurrer, the allegations of the amended complaint must be considered true.

Second, the court also failed to examine these statements in light of Dr. Smith's euthanasia claims. All of Dr. Smith's statements must be viewed in light of the assertion that Dr. Cashion euthanized the patient. *Hyland*, 277 Va. at 48, 670 S.E.2d at 751. The accusation that Dr. Cashion purposefully killed the patient like he was an animal colors all the statements he made about the care Dr. Cashion provided the patient. The euthanasia statement is an assertion of fact that the trial court held was "a

provably false statement."[4] (JA 66). Considering Dr. Smith's other statements in the context of his assertion that Dr. Cashion euthanized the patient, it is evident that all of Dr. Smith's statements, taken as a whole, assert provably false matters about the care (or lack of care) Dr. Cashion provided the patient.

Third, the other statements contain provably false facts. For example, whether the patient could have made it with better resuscitation and whether Dr. Cashion determined from the beginning that the patient wasn't going to make it and purposefully didn't resuscitate him are provably false statements. It can be proven that the patient would not have survived with better resuscitation, and that Dr. Cashion did not purposefully fail to resuscitate the patient (i.e., let the patient die). The cause of death is a medical fact. The medical records and the testimony of witnesses will establish whether the patient could have survived with better resuscitation and whether Dr. Cashion simply let the patient die. The standard of care is a barometer for measuring the care Dr. Cashion provided in resuscitating the patient, and is not simply a matter of Dr. Smith's opinion on the matter. *See Fuste*, 265 Va. at 133, 575 S.E.2d at 861(statements that plaintiff

[4] The defendants have not appealed the trial court's conclusion that the euthanasia statement is "provably false" and not opinion. Therefore, that finding is final.

physicians "abandoned" their patients and that there were "concerns about their competence" contained "a provably false factual connotation").

Considering all of Dr. Smith's statements and the allegations in the amended complaint, Dr. Smith's statements about Dr. Cashion's care are not pure matters of opinion. They do not relate solely to Dr. Smith's point of view. Rather, they are capable of being proven false, just as the "euthanasia" statement is. (JA 66, where the trial court held that the euthanasia statement is "provably false"). Considering all the statements as a whole, they assert fact, not opinion. Therefore, the trial court erred in dismissing these statements on demurrer.

2. A qualified privilege did not attach to Dr. Smith's statements that Dr. Cashion euthanized the patient.

The trial court erred in finding that Dr. Smith's communications accusing Dr. Cashion of euthanizing a patient is protected by a qualified privilege. "'A communication, made in good faith, on a subject matter in which the person communicating has an interest, or owes a duty, legal, moral, or social, is qualifiedly privileged if made to a person having a corresponding interest or duty.'" *Great Coastal Express, Inc. v. Ellington*, 230 Va. 142, 153, 334 S.E.2d 846, 853 (1985).

First, the duty did not exist because the medical procedure and the care of the patient had ended when the statements were made. (JA 5-7, ¶¶25, 29-33). In fact, they were made *after* the patient had died. Further, they were made in the presence of Dr. Crawford, who did not participate in the patient's care and did not share a corresponding duty in the patient's care. Therefore, no common duty protected these defamatory statements.

Second, as the trial court acknowledged, good faith is required in order for the privilege to attach. (JA 243, citing *Great Coastal Express, Inc.*, 230 Va. at 153, 334 S.E.2d at 853). There are facts from which a jury could conclude that the "euthanize" statements were made in bad faith. For example, the statements were made after the patient had died (and nothing further could be done to save him), were made in the presence of at least one person who was not part of the patient's treatment team, were a loud and aggressive outburst, openly accused Dr. Cashion of a crime, and were excessively outrageous. (JA 5-7, 13, ¶¶25, 29-33, 67). Dr. Smith also refused to apologize for these statements even though he later acknowledged their falsity. (JA 8-11, ¶¶40, 44, 50, 54-55). On this record, the issue of Dr. Smith's good faith was a question for the jury.

Third, Dr. Smith admitted that the statements were not true. (JA 11 ¶55). Thus, he completely lacked a good faith basis to make them.

Accordingly, the trial court erred in finding that Dr. Smith's statements that Dr. Cashion euthanized the patient are privileged.

3. Jury issues were presented on the questions whether the qualified privilege was lost or abused and whether it was defeated by a lack of good faith or the existence of malice.

Even if there is a qualified privilege, a jury must decide whether the privilege was lost or abused and whether the statements were made with malice and in good faith. These are quintessentially questions of fact for the jury that the trial court could not resolve on summary judgment.

Good faith, which is an essential part of the existence of a qualified privilege, is a question of fact for the jury. *E.g.*, *Great Coastal Express, Inc. v. Ellington*, 230 Va. 142, 153, 334 S.E.2d 846, 853 (1985); *Aylor v. Gibbs*, 143 Va. 644, 645, 129 S.E. 696, 699 (1925). Similarly, factual questions are presented on the issues of whether the Defendants lost or abused the qualified privilege and whether there is malice. *See, e.g., Fuste v. Riverside Healthcare Ass'n, Inc.*, 265 Va. 127, 134, 575 S.E.2d 858, 863 (2003) (whether the qualified privilege has been lost or abused and whether the words were spoken with malice are questions of fact); *Smalls v. Wright*, 241 Va. 52, 55-56, 399 S.E.2d 805, 807-08 (1991); *Great Coastal Express, Inc.*, 230 Va. at 153-54, 334 S.E.2d at 853-54. Because

all of these issues are for the jury to decide, summary judgment is inappropriate.

It is well-established that a qualified privilege may be lost where:

1. the statement was deliberately made in such a way that it was heard by persons having no interest or duty in the subject of the statement; or

2. the statement was unnecessarily insulting; or

3. the language used was stronger or more violent than was necessary under the circumstances; or

4. the statement was not spoken in good faith and/or the speaker lacked an honest belief in its truth; or

5. the statement was made with malice.

See generally Smalls, 241 Va. at 55, 399 S.E.2d at 807-08 *and Great Coastal Express*, 230 Va. at 153-54, 334 S.E.2d at 853-54. As these various abuses of the privilege are listed in the disjunctive, "[a]ny one of the elements, if proved," defeats the privilege. *Great Coastal Express*, 230 Va. at 154, 334 S.E.2d at 854; *see also Smalls*, 241 Va. at 55, 399 S.E.2d at 807-08 (listing the abuses of the privilege in the disjunctive).

Therefore, although the question whether the privilege attaches is for the court to decide, the jury decides whether the privilege has been lost on any one of these grounds. *Fuste*, 265 Va. at 134, 575 S.E.2d at 863. For this reason, this Court has routinely approved of instructions in defamation

cases submitting to the jury the issues of loss or abuse of the qualified privilege, the absence of good faith, and malice. *Smalls*, 241 Va. at 55-56, 399 S.E.2d at 807-808 (approving jury instruction on malice and abuse of the privilege); *Great Coastal*, 230 Va. at 153-54, 334 S.E.2d at 853-54 (approving jury instruction on malice, good faith, and abuse of the privilege); *see also Taylor v. Grace*, 166 Va. 138, 144-46, 184 S.E. 211, 213-14 (1936) (malice is a question for the jury); *Aylor*, 143 Va. at 647 and 654, 129 S.E. at 697 and 699 (good faith is a question of fact for the jury).

In *Smalls* and *Great Coastal Express*, the Supreme Court approved instructions that submitted to the jury the question whether a qualified privilege had been lost or abused. As these cases demonstrate, even when a communication is privileged, issues of abuse of the privilege, lack of good faith, malice, disproportionate response, unnecessarily insulting words, and the presence of uninterested persons are questions for a jury to decide at trial.

In *Smalls*, a Caucasian woman with a bi-racial child wrote a letter to the local chief of police complaining about a police officer in the department. The letter lodged an official complaint against the officer; it alleged that the officer had stopped and charged the woman with speeding because her daughter, who was seated in the vehicle, was considered

black. The officer sued her for defamation. The trial court submitted the case to the jury, which returned a verdict for the officer.

On appeal, this Court held that the trial court should have found, as a matter of law, that the letter to the police chief was qualifiedly privileged. *Id.* at 54-55, 399 S.E.2d at 807. However, the Court further held that the trial court should have granted a jury instruction concerning abuse of the privilege. That instruction provided:

> Under certain circumstances, a person has a limited privilege to make a defamatory statement about another without being liable for damages.
>
> Under the circumstances of this case, . . . Christel Small's statement was privileged because she has an interest or duty in the subject, and she made the statement to another person with a similar interest or duty. Her statement is not protected, however, if she abused the privilege.
>
> A privilege is abused when the plaintiff proves by clear and convincing evidence that:
>
> (1) The defendant knew that statement was false or made it with reckless disregard of whether it was false or not; or
>
> (2) The statement was deliberately made in such a way that it was heard by persons having no interest or duty in the subject of the statement; or
>
> (3) The statement was unnecessarily insulting; or

> (4) The language used was stronger or more violent than was necessary under the circumstances or
>
> (5) The statement was made because of hatred, ill will or a desire to hurt the plaintiff rather than as a fair comment on the subject.

Id. at 55, 399 S.E.2d at 807-08. The Court held that this instruction "accurately incorporates language used in various of our cases that have discussed the elements of common-law malice *and abuse of a qualified privilege*." *Id.* at 56, 399 S.E.2d at 808 (emphasis added). The case was remanded for a new trial because the trial court had failed to give this instruction, which would have permitted the jury to decide whether the privilege was defeated. That instruction not only covered malice; it also covered a wide range of ways the privilege could be abused and lost.

Similarly, in *Great Coastal Express*, this Court approved an instruction which submitted the questions of malice and abuse of the privilege to the jury. In that case, a truck driver sued his employer for defamation after his employer publicly accused him of bribery. Based upon the parties' agreement, the trial court held that the words were privileged. *Id.* at 153, 334 S.E.2d at 853. At trial, the trial court instructed the jury that the statement was privileged, but could be lost if there was malice, a lack of good faith or abuse of the privilege. The instruction provided that the

privilege was lost if the jury found that the communication: (1) was not spoken in good faith and without an honest belief in its truth; (2) was made with malice; (3) was made with language which was intemperate or disproportionate in strength and violence to the occasion and which was unnecessarily defamatory of the plaintiff; (4) was made in a manner which gave unnecessary publicity to such words; or (5) was purposely made in the presence of persons who were wholly uninterested in the matter and who had no right to be present and who in the natural course of things would not have been present. *Id.* at 153-54, 334 S.E.2d at 853-54. A jury returned a verdict for the plaintiff.

On appeal, this Court specifically held that any of the elements listed in the instruction would suffice to defeat the qualified privilege. *Id.* at 154, 334 S.E.2d at 854. Thus, this Court generally approved this instruction.[5] *Id.*

Smalls and *Great Coastal* show that questions of malice and abuse of the qualified privilege are questions for the jury. Even on the limited summary judgment record in the case at bar, there is evidence from which

[5] This Court did find one error in the instruction because it permitted the jury to find malice on a preponderance of the evidence, rather than by clear and convincing evidence. *Id.* at 154, 334 S.E.2d at 854. However, that error was harmless because the jury had awarded punitive damages, thereby necessarily finding malice by clear and convincing evidence. *Id.* at 155, 334 S.E.2d at 855.

the jury could find that the privilege was abused, there was bad faith or that it was overcome by malice. Dr. Smith's statements accused Dr. Cashion of killing the patient. His choice of words was outrageous; they suggested that Dr. Cashion had intentionally dispatched the patient as if he were an animal. The words used were unnecessarily insulting and disproportionate to the professional setting of a hospital. They were spoken in the presence of someone who was not necessary to the communication. Dr. Crawford, who overheard the statement, was not even part of the trauma team that unsuccessfully treated this patient. Further, as Dr. Cashion alleged, the statements were spoken loudly and aggressively. (JA 6, ¶¶ 29, 31). This was an extreme verbal outburst. Finally, Dr. Smith admitted that he never believed that Dr. Cashion euthanized the patient. (JA 11, ¶55).

In short, a jury could find from these facts and circumstances that Dr. Smith did not make the statement in good faith, it was not a proportionate response, it was unnecessarily insulting, it was made in the presence of uninterested people, it was made with malice, and he otherwise abused the privilege. Summary judgment is simply inappropriate because the questions of good faith, malice, and abuse of the privilege are factual issues to be decided by the jury at trial.

ARGUMENT AND AUTHORITIES ON ASSIGNMENTS OF CROSS-ERROR

4. **The trial court correctly found that Dr. Smith's statement was not rhetorical hyperbole.**

Defendants assign cross-error to the trial court's finding that Dr. Smith's statement accusing Dr. Cashion of euthanizing the patient is not rhetorical hyperbole. (JA 262). Statements which cannot reasonably be understood to convey a false representation of fact are protected speech. *Yeagle v. Collegiate Times*, 255 Va. 293, 296, 497 S.E.2d 136, 137 (1998). Rhetorical hyperbole "might appear to make an assertion, but a reasonable reader or listener would not construe that assertion seriously." *Schnare v. Ziessow*, 104 Fed. Appx. 847, 851 (4th Cir. 2004). The United States Supreme Court has described rhetorical hyperbole as "loose, figurative, or hyperbolic" language. *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 21 (1990).

This Court has discussed examples of rhetorical hyperbole, none of which fit here:

> Examples include referring to the negotiating position of a real estate developer as "blackmail," *Greenbelt Coop. Publ'g Ass'n, Inc. v. Bresler*, 398 U.S. 6, 13-14, 26 L. Ed. 2d 6, 90 S. Ct. 1537 (1970), defining a labor union "scab" to be a "traitor," *Letter Carriers v. Austin*, 418 U.S. 264, 284-86, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974), or publishing a parody of an advertisement referring to a public figure, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50, 99 L. Ed. 2, 41, 108 S. Ct. 876 (1988). In each

> of these instances, no reasonable inference could be drawn that the individual identified in the statements, as a matter of fact, engaged in the conduct described.

Yeagle, 255 Va. at 296, 497 S.E.2d at 137. Thus, rhetorical hyperbole is characterized by the silly,[6] the commonly-understood metaphorical insult,[7] and the non-existent.[8] Simply put, when hyperbole is used as a rhetorical devise, it is not meant to be taken seriously.[9]

The question of law for this Court is "whether the complained of phrase including inferences fairly attributable to it could reasonably be interpreted as stating actual facts about [Dr. Cashion] and, therefore, be actionable defamation." *See Yeagle*, 255 Va. at 297, 497 S.E.2d at 137. To answer this question, the court examines the circumstances in which the statement is made. *Schnare*, 104 Fed. Appx. at 851. Here, if no reasonable inference can be drawn that Dr. Cashion, as a matter of fact,

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[6] *E.g.*, *Yeagle*, 255 Va. at 296, 497 S.E.2d at 137 (a student newspaper referring to an administrator as the university's "Director of Butt Licking").

[7] *E.g.*, *Crawford v. United Steel Workers, AFL-CIO*, 230 Va. 217, 234-235, 335 S.E.2d 828, 839 (1985) (a steelworker who crossed a picket line was called a "cock.....r" and a "mother.....r").

[8] *E.g.*, *Lewis-Gale Med. Ctr., LLC v. Alldredge*, 282 Va. 141, 152, 710 S.E.2d 716, 721-722 (2011) (referring to an emergency room physician as an "organizational terrorist").

[9] *See* definition of "hyperbole" as "1. Obvious and intentional exaggeration; 2. an extravagant statement or figure of speech not intended to be taken literally, as 'to wait an eternity'" at www.dictionary.reference.com/browse/hyperbole.

euthanized the patient, then the statement is purely rhetorical hyperbole and, therefore, not actionable as defamation. *Yeagle*, 255 Va. at 296, 497 S.E.2d at 137.

The trial court concluded that the statement could reasonably be construed as stating facts about Dr. Cashion:

> . . . in this case, it is believable that a surgeon's euthanasia comment about an anesthesiologist, directly after a patient has died on the operating table, meant that the anesthesiologist committed malpractice, and euthanized a hopeless patient. If that is what Smith believed to have occurred, then a euthanasia comment would not be hyperbole, but rather, a listener could make the reasonable inference that Smith declared that Cashion made a deliberate decision with the anesthesia.

(JA 243-243).

Considering the context in which the statement was made, the trial court's conclusion is plainly correct. Dr. Smith's accusations of "euthanasia" were made contemporaneously with the patient's dying and death. Due to his role as chief surgeon in the operating room, Dr. Smith was in a position to know some facts about the care Dr. Cashion provided to the patient. Further, as the anesthesiologist, Dr. Cashion actually had the ability to euthanize the patient. He was responsible during the procedure for the patient's sedation and airway. Thus, the statement could be taken to be literally true. Consequently, it was not merely a silly exaggeration that no one would take seriously. *Compare Yeagle*, 255 Va.

at 297, 497 S.E.2d at 138 (student newspaper statement referring to a university administrator as the "Director of Butt-Licking," is rhetorical hyperbole because it cannot reasonably be understood as stating an actual fact about the administrator's job title or conduct).

Instead, Dr. Smith's accusation was asserted as a statement of medical fact that Dr. Cashion had killed a patient: the statement used medical terminology to describe a medical procedure; it was made at a time when it could be considered true; it was made by someone who could reasonably be understood to have information to make that assertion; and, in the context of the death of a patient after an unsuccessful surgery in which both doctors had participated, it could reasonably be understood by a listener to be stating a fact about Dr. Cashion's medical care. Thus, the trial court was correct in finding that it was not rhetorical hyperbole.

CONCLUSION

Dr. Smith leveled a defamatory accusation at Dr. Cashion. A jury should determine whether Dr. Smith is liable for that accusation and the resultant harm to Dr. Cashion. Therefore, the trial court's decision should be reversed and remanded for further proceedings, including a trial.

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CERTIFICATE OF SERVICE

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

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On April 8, 2013, the correct number of true and accurate copies of this Opening Brief were hand-filed with the Supreme Court of Virginia, and the correct number of copies have been served upon counsel for the appellee by first class mail at the address listed above.

This brief does not exceed the 50 page limitation set forth in Rule 5:26(b).

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