In The Iowa Supreme Court
Supreme Court No. 20-0023

MARK H. ANDREW, M.D.,

Plaintiff-Appellee,

vs.

HAMILTON COUNTY PUBLIC HOSPITAL dba VAN DIEST MEDICAL CENTER,

Defendant-Appellant.

Appeal from the District Court for Hamilton County

The Honorable James A. McGlynn

Appellant's Final Reply Brief

Oral Argument Requested

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Introduction

Dr. Andrew's recitation of the facts is devoted mainly to the termination of his employment, an issue that is not before this Court on appeal. He describes, at length, the Hospital's internal policies and procedures, his belief that the Hospital's CEO, Lori Rathbun, was seeking to "oust" him, and even questions Rathbun's competence because she "was not a doctor". Yet he ignores the fact that the actual allegedly defamatory statements that form the basis for this appeal were made by Scott Altman, a doctor (with the input of Nicole Ehn, another doctor). Indeed, his factual recitation concludes by stating his belief that the Hospital's stated reasons for his termination did not support a "for cause" designation, which is irrelevant to this appeal. (Appellee Br. at 22). That Dr. Andrew largely avoids discussion of the Board Reports and NPDB Report, and facts that caused them to be filed, is telling.

Argument

I. The district court erred by failing to hold, as a matter of law, that the alleged defamatory statements at issue were protected statements of opinion.

A. The Hospital's opinion defense is preserved for appeal.

This is an interlocutory appeal. By definition, such appeal is directed to "an interlocutory ruling of the district court". Iowa R. App. P. 6.104(1)(a). The Hospital sought, and was granted "permission to appeal in advance of a final judgment." Id. Citing cases involving appeals from final orders, Dr. Andrew incorrectly claims that error was not preserved because the district court did not "expressly rule" on the Hospital's opinion defense.[1]

In its summary judgment papers, the Hospital argued it was entitled to Summary Judgment on Counts III and IV on the grounds that the allegedly defamatory statements were opinions. In its resistance, Dr. Andrew argued to the contrary. The district court

[1] Notably, Dr. Andrew did not discuss error preservation in his resistance to the Hospital's application for interlocutory appeal.

ruled on these claims when it issued its order stating: "The Court is unable to say as a matter of law that the defense is entitled to summary judgment on either Count III or Count IV." (JA-I, 10). As a result, the issue is preserved for review by this court.

That the district court did not expressly hold the allegedly defamatory statements at issue were "fact" or "opinion" is of no consequence. It did hold that "issues of good faith and malice are issues of fact for the jury. (JA-I, 9). As it is black letter law that a statement of "opinion" is not actionable as defamation, see, e.g., Yates v. Iowa West Racing Ass'n, 721 N.W.2d 762, 771 (Iowa 2006), it must be inferred the district court based its express holding on that which is implicit, but essential – that the statements at issue are statements of fact. See Linge v. Ralston Purina Co., 293 N.W.2d 191, 195 (Iowa 1980) (error preserved when the record and ruling infers the issue was decided).[2]

[2] The district court need not address a claim in great depth in order to rule on a claim and preserve it for appeal. See, e.g., Jervik v. DPD, Ltd., No. 16–0381, 2017 WL 6026930 at *4 (Iowa Ct. App. Nov. 22,

B. The allegedly defamatory statements are protected statements of opinion.

It is telling that Dr. Andrew's brief offers no rebuttal (or even response) to the Hospital's argument that ***none*** of the factual information set forth in the Board Reports is false. Again, that information includes:

- The fact that Dr. Andrew, a general surgeon, prescribed between "12 and 15,000 hydrocodone tablets" to a single patient;
- The fact that Dr. Andrew never utilized the PMP or referred the patient to a pain management (or other specialist) over a multiyear relationship with a complex patient;
- The fact that Dr. Andrew did not have a pain management agreement in place with his patient;
- The fact that the patient reported using multiple pharmacies, multiple insurance policies (plus cash), and multiple addresses and birthdates to purchase the narcotic prescriptions;

2017) (finding the court had impliedly ruled on Plaintiff's public policy argument although that argument was not expressly referenced in the court's order); Estate of Gottschalk v. Pomeroy Development, Inc., 2016 WL 1129995, No. 14–1326 at *3 (Iowa Ct. App. Mar. 23, 2016) rev'd in part, 893 N.W.2d 579 (Iowa 2017) (issue preserved even when not specifically addressed where issue was fully briefed and court and adverse party had notice for the basis of the claim).

- The fact that Dr. Andrew performed a bilateral orchiectomy without consultation or referral to a urologist or pain management specialist; and

- The fact that Dr. Andrew continued to prescribe narcotics to a patient while knowing that significant surgeries were performed on the patient at other hospitals.

(JA-II, 19-21).

Instead, Dr. Andrew makes the following spurious claim: "There was no evidence whatsoever to support an allegation that Dr. Andrew's volume of narcotic prescribing was excessive or that he was colluding with his patient to use or sell prescription drugs." (Appellee Br. at 33). He even goes so far as to argue that these alleged statements "are assertions that can be, and have been, proved false." (Id. at 20). This argument is simply incorrect, factually. Regardless, Dr. Andrew falls back on inapplicable libel per se presumptions in an attempt to sidestep the proper analysis to determine whether the statements at issue are actionable defamation or constitutionally protected opinion.

First, Dr. Altman's concerns that Dr. Andrew's prescribing practices "appear" to be "beyond reasonable" and "excessive" was based on the undisputed factual information discussed above.

As set forth more fully in the Hospital's initial brief, "appropriate pain management" (and the exercise of "sound clinical judgment") ***requires*** consideration of the many factors referenced by Dr. Altman. *See* Iowa Admin. Code r. 653-13.2(5), (7). Whether the undisputed facts in this case amount to "appropriate" or "inappropriate" pain management (or an "excessive" or "appropriate" volume of narcotics) is plainly a matter of opinion. Indeed, like most cases where the exercise of a physician's clinical judgment and/or provision of clinical care is at issue, both Parties have designated qualified experts to offer their ***opinions*** on this very issue. The fact that such experts may ultimately disagree on some or all of conclusions to be drawn from these undisputed facts is immaterial – their ***opinions*** are not, in the constitutional sense, objectively capable of proof or disproof such that they can be verified.

See, e.g., Jones v. Palmer Communications, Inc., 440 N.W.2d 884, 891-92 (Iowa 1989).

Second, Dr. Andrew's prior suggestion that Dr. Altman's concern that the volume of Dr. Andrew's narcotic prescriptions "raises questions of marked naiveté, gross incompetence, and/or collusion with the patient for self-use, dealing, and/or distribution" amounts to an accusation that Dr. Andrew "was a drug dealer" is both inaccurate and unnecessary. Bluntly, one is hard-pressed to conclude that the prescription of 12,000 to 15,000 opioid pills by a general surgeon to a single patient, without the utilization (or, in many instances, even consideration) of ***any*** of the safeguards set forth in the Iowa Administrative Code, "raises questions" about anything other than ignorance, incompetence, or something more problematic. In any event, the ***actual statement*** at issue – that Dr. Andrew's undisputed conduct "raises questions" of the sort identified by Dr. Altman – is not a statement that is objectively capable of proof or disproof such that it can be verified. Again, both Parties have

designated qualified experts to offer their ***opinions*** on this very issue.[3]

Further, Dr. Andrew's argument simply ignores the "literary context" of the Board Reports – namely, the legislative purpose for

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[3] Dr. Andrew continues to argue that Dr. Christian Ledet, the Hospital's retained expert in this litigation, "agreed that the amount of opioid medication prescribed by Dr. Andrew was not unsafe." (Appellee Br. at 19). This is untrue, and is a mischaracterization of Dr. Ledet's testimony cited by Dr. Andrew:

> Q: Your report, under "Patient L.H." on the fourth line, indicates that the "the dosage of opioid prescribed by Dr. Andrew would not generally be considered excessive. Did I get that right?
>
> A: That is correct.

(JA-1, 192 [38:1-6]). "Dosage", as Dr. Andrew is well-aware, refers to quantity of narcotic in each ***dose*** of medication (*i.e.* – 10 mg, 20 mg, etc.). It does not refer to the "volume" of Dr. Andrew's prescriptions, which is what Dr. Altman reported, and of which Dr. Ledet testified – unequivocally – was unsafe. Further, the patient discussed in the cited testimony was ultimately referred to Dr. Ledet, who is a pain specialist. After conducting an evaluation of the patient, including drug screening, Dr. Ledet advised the patient that his clinic would not prescribe opioids, after which the patient left and never returned.

which the confidential reporting framework was intended to serve.[4] Dr. Andrew is correct that, in some instances, a statement that a physician colluded with a patient for purposes of "self-use, dealing, and/or distribution" may be objectively capable of proof or disproof. However, Dr. Altman's opinion – in a confidential report to the Iowa Board of Medicine – that the undisputed facts in this case "raise questions" of the sort identified therein is, respectfully, not such a statement. The literary context of the Board Reports compels the conclusion that the statements at issue are constitutionally-protected statements of opinion and are not actionable as defamation.

[4] Dr. Andrew acknowledges that the Board Reports were confidential, but states that he was "required to disclose the reports to potential employers, including the allegations made by VDMC." (Appellee Br. at 33). This claim is made without citation to the record because it is untrue. Indeed, Dr. Andrew had not even seen one of the reports until his deposition in this case, (JA-I, 179 [222:17-223:19]), and has never claimed or presented evidence that he disclosed Dr. Altman's opinion that Dr. Andrew's conduct "raises questions of . . . . collusion with the patient for self-use, dealing, and/or distribution" to anyone. Potential employers do not have access to confidential reports filed with the Board.

Finally, Dr. Andrew concedes that it is his burden to prove "actual malice". (Appellee Br. at 23-25, 27). At the same time, however, he continues to argue that the presumption of "falsity" of the libel per se doctrine still apply to the statements at issue in this case. (Id. at 24-25). For the reasons set forth in the Hospital's initial brief, Dr. Andrew's concession that he must prove "actual malice" necessarily includes the concession that he must prove the statements at issue are also actually false.

The statements at issue are constitutionally-protected statements of opinion, not facts, and are not actionable as defamation. The district court plainly erred in denying the Hospital's motion for summary judgment on Dr. Andrew's defamation claims.

II. A "good faith" standard does not apply to Dr. Andrew's defamation claims.

Even after conceding he must prove "actual malice", Dr. Andrew still argues that the district court's application of a "good faith" standard was proper. As stated in the Hospital's initial brief, Iowa law does ***not*** require a showing that the [report] be filed in

good faith." Gibson v. Buckley, DDS, No. 14-1108, 2015 WL 2394116, at *3 (Iowa Ct. App. May 20, 2015) (McDonald, J.).

Kelly v. Iowa State Educ. Association does not support Dr. Andrew's argument. 372 N.W.2d 288 (1985). To the contrary, the court expressly considered whether the plaintiff met his "burden of proving that defendants acted with ***actual malice***", not whether the defendants' statements were made in good faith.[5] Id. at 296 (emphasis added). Citing United States Supreme Court precedent, the court did observe that "[p]rofessions of good faith" do not "automatically insure a favorable verdict" for the defendant. Id. at 296-97 (quoting St. Amant v. Thompson, 390 U.S. 727, 732 (Iowa 1968)).[6] This is, of course, true. But so too is the inverse – *i.e.* a lack of

[5] Kelly involved statements that the trial court held were libelous per se. Kelly, 372 N.W.2d at 297. The court also expressly noted that the defendants did not raise an opinion defense on appeal. Id.

[6] See also Bertrand v. Mullin, 846 N.W.2d 884, 895 (Iowa 2014) ("However, the Supreme Court has indicated that mere protestations of good faith and declarations that the speaker believed the statement to be true are not automatically sufficient to avoid liability") (quoting St. Amant, 390 U.S. at 732); Barreca v. Nickolas, 683 N.W.2d 111, 123

"good faith" does not automatically insure a favorable verdict for the plaintiff.

In any event, Kelly was decided years before Barreca v. Nickolas, where this Court expressly abrogated "the old common law improper motive test" for actual malice, and adopted the current "knowing or reckless disregard" standard. 683 N.W.2d at 119-23. Unlike the improper motive standard (which defined actual malice as "ill-will, hatred or desire to do another harm"), the "knowing or reckless disregard" standard "focuses upon the attitudes of defendants vis-à-vis the truth of their statements, as opposed to their attitudes towards plaintiffs." Id. at 119-120 (citations and quotations omitted). Thus, neither the presence ***nor*** absence of "good faith" (however defined) is an element of a defamation claim or defense.

The district court erred in holding that Iowa statutory immunity protects only "statements made in good faith".

(Iowa 2004) ("[p]rofessions of good faith will be unlikely to prove persuasive . . . where a story is . . . based wholly on an unverified anonymous telephone call.") (quoting St. Amant, 390 U.S. at 732).

III. Issues relating to the Health Care Quality Improvement Act ("HCQIA") were not raised by the Parties at the district court and should not be considered on appeal.

Dr. Andrew concedes that he did not raise any issues relating to the HCQIA at the district court. (Appellee Br. at 38). That should be the end of the inquiry, and these new issues should not be considered on appeal.[7]

Regardless, as set forth in the Hospital's initial brief, the NPDB Report does not include either of the two allegedly defamatory statements Dr. Andrew now identifies ("an allegation that Dr. Andrew's volume of narcotic prescribing was excessive" and "that he was colluding with his patient to use or sell prescription drugs.") (Appellee Br. at 33). Dr. Andrew offers no rebuttal. Instead, he seems now to argue that the ***act*** of filing the NPDB Report – without regard to its content – was somehow defamatory. No authority is

[7] Contrary to Dr. Andrew's argument, the Hospital cited authority supporting the conclusion that the district court's introduction of new issues, *sua sponte*, two weeks before trial was improper. (Appellant's Br. at 57 n. 20).

cited for this contention, which again, was never raised at the district court. (JA-I, 88-89, 93).

This Court should not consider Dr. Andrew's new arguments relating to the HCQIA because they were not raised at the district court, and Dr. Andrew's failure to disclose this new theory is not substantially justified nor would it be harmless. See Iowa R. Civ. P. 1.517(3)(a). The district court abused its discretion is raising these issues *sua sponte*.

IV. Compensation Dr. Andrew may have earned had the Agreement been terminated "without cause" is not "wages" under the Iowa Wage Payment Collection Act ("IWPCA").

Dr. Andrew's brief continues his improper attempt to convert a breach of contract claim into something that it is not.[8]

He correctly notes that a "severance payment" under the IWPCA is an "amount which is granted at contract termination on account of past services." (Appellee Br. at 42 (quoting McClure v.

[8] This claim was added after a year and half of litigation, and only after Judge Bennett dismissed Dr. Andrew's age discrimination claims.

Int'l Livestock Imp. Services Corp., 369 N.W.2d 801, 805 (Iowa 1985)). However, Dr. Andrew then engages in hypothetical mental gymnastics to obfuscate the obvious (and irrefutable) conclusion that the additional 90-days of salary he claims – even under his hypothetical – would be granted (if at all) ***prior*** to contract termination, and would be based on his continued status as an ***employee***. This is not a "severance payment".

Dr. Andrew argues that "if a jury determines VDMC would have relieved Dr. Andrew of his duties, then his compensation under Section 9(a) would have become immediately 'owed' because all conditions to earn the compensation would have been met at that moment." (Appellee Br. at 41). This is simply incorrect. Indeed, even Dr. Andrew acknowledges he would have remained the Hospital's employee for the duration of the 90-day notice period, regardless of whether or not he was relieved of his duties. (Id. at 43 ("Although Dr. Andrew would have remained a VDMC employee during the notice period, his status as an 'employee' places form over substance.")).

Subsumed within this acknowledgement (and explicit in the Agreement itself) is the fact that the Agreement also ***would not terminate*** until the expiration of the 90-day period.

Thus, had the Hospital provided Dr. Andrew with a "notice of termination" pursuant to Section 9(a) of the Agreement, his employment with the Hospital would have continued for 90 days, during which time he would have continued to ***earn*** his salary (paid on the same schedule) regardless of whether or not he was relieved of his duties. (JA-I, 122 [§ 9(a)]). Notwithstanding Dr. Andrew's argument to the contrary, the law does not prohibit an employee from having the "job" of getting paid to sit at home and do nothing. That is precisely what the Agreement contemplates.

Dr. Andrew's further claim that, under his hypothetical, he "would not have been . . . prevented from seeking additional employment during the notice period" is also incorrect, and illustrates his misunderstanding of basic contract law. To be sure, he would not necessarily be prevented from ***seeking*** new employment.

However, any decision to ***start*** such employment during the 90-day notice period would be a breach of the Agreement. That, again, is because Dr. Andrew would remain the Hospital's ***employee***, and the Agreement would ***not terminate***, for 90 days.[9]

Just as in McClure, Section 9(a) of the Agreement is a notice of termination provision, not a "severance payment" under the IWPCA. Dr. Andrew's remedy lies only in contract. The district court plainly erred in denying summary judgment to the Hospital on Dr. Andrew's claim under the Iowa Wage Payment Collection Act.

CONCLUSION

For the reasons and those set forth in its Appellant Brief, Defendant Hamilton County Public Hospital d/b/a Van Diest Medical

[9] Under such scenario, Dr. Andrew might request that the Hospital agree, in writing, to an early termination of the Agreement so that he might begin additional employment during the 90-day notice period. While such an agreement may well be in the best interests of both Parties, the Hospital would have no obligation to do so. It goes without saying that if the Hospital agreed to an early termination of the Agreement, the Agreement would ***terminate***. If that transpired, the Hospital would owe Dr. Andrew nothing.

Center respectfully requests that the Court reverse the district court and hold that Dr. Andrew's defamation claims (Counts III and IV) and claim for violation of the Iowa Wage Payment Collection Act (Count V) fail as matter of law, and remand to the district court for further proceedings.

REQUEST FOR ORAL SUBMISSION

Defendant-Appellant Hamilton County Public Hospital dba Van Diest Medical Center respectfully request oral argument regarding the issues presented in this appeal.

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I hereby certify that on June 19, 2020, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel below:

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