

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Christopher Anthony Roller,

Case Type: Personal Injury  
Court File No.: PI 05-006530

Plaintiff,

vs.

**MEMORANDUM OF LAW IN SUPPORT  
OF DEFENDANT'S MOTION TO DISMISS  
PURSUANT TO MINN. R. CIV. P 12.02**

Allina Health Systems,

Defendant.

**INTRODUCTION**

This lawsuit arises out of pro se plaintiff Christopher Roller's treatment and/or communications with physicians at New Ulm Medical Center, New Ulm, Minnesota and/or United Hospital, St. Paul, Minnesota. Both facilities are owned by Defendant Allina Health Systems (hereafter "Allina"). Although the Complaint is not entirely clear, Plaintiff's defamation claims against Allina seemingly stem from treatment and/or communications which took place on May 6, 2003, in January 2003, and/or dating back to 1999.

Plaintiff appears to allege defamation and slander apparently because he believes the treatment and symptoms described in his medical records somehow resulted in damage to his character and negatively impacted his future credibility and reputation. First, regardless of the date on which Plaintiff bases his Complaint, the applicable statute of limitations bars Plaintiff's claims. Second, the Complaint does not allege facts that support a defamation claim, and should be dismissed for failure to state a claim upon which relief can be granted. To the extent Plaintiff alleges that medical records

describing his treatment and/or diagnosis are defamatory, Allina is protected by both qualified and absolute privileges. Further, to the extent Plaintiff's claims are based on his hospitalization in the Spring of 1999, Allina is immune from suit. On June 18, 1999, Plaintiff was committed pursuant to the Minnesota Commitment and Treatment Act (Minn. Stat. § 253B.01 et seq.). Any person acting in good faith pursuant to any provision of the Act is immune from civil or criminal liability. For all these reasons, Plaintiff's Complaint should be dismissed in its entirety.

### **ISSUES PRESENTED**

1. Are Plaintiff's claims barred by the two-year statute of limitations on libel and slander actions as stated in Minn. Stat. § 541.07, subd. 1?
2. Did Plaintiff fail to plead defamation with the requisite specificity?
3. Does Plaintiff's Complaint fail to state a valid defamation claim because it does not allege that Allina "published" a "false and defamatory statement" about the Plaintiff to someone other than the Plaintiff?
4. Is Allina protected from Plaintiff's defamation claims because of a qualified privilege?
5. Is Allina immune from suit pursuant to Minn. Stat. § 253B.23, subd. 4 of the Minnesota Civil Commitment Act?

### **DOCUMENTS RELIED UPON**

1. Plaintiff's Complaint; and
2. Excerpts from Plaintiff's Medical Records.

## STATEMENT OF FACTS

Plaintiff was seen by Dr. Vanita Mishra on May 6, 2003 for medication and to have an application for social security disability benefits completed. (See "05/06/03 Psychiatric Diagnostic Assessment/Evaluation," Attached as Exhibit A to the Affidavit of Paula M. Semrow (hereafter "Semrow Affid.")). Dr. Mishra had previously treated Plaintiff in November 2002, at which time he was hospitalized for bipolar disorder. (Exhibit A, Pg. 1 and "11/02/02 Admission History and Physical," Attached as Exhibit B to Semrow Affid.).

During the May 6, 2003 visit, Plaintiff discussed his belief that the CIA was conspiring against him based on previous threats he had made to the CIA regarding the President. (Exhibit A, Pg. 2). Plaintiff's previous threats had led to an investigation by the United States Secret Service. (See "01/27/03 Behavioral Medicine – In-Patient Addendum to Progress Note," Attached as Exhibit C to Semrow Affid.). On January 13, 2003, Plaintiff gave the United States Secret Service consent to access his medical and psychiatric files. (See "Consent to Review Medical/Psychiatric Files," Attached as Exhibit D to Semrow Affid.). On January 27, 2003, after obtaining Plaintiff's written consent, Dr. Mishra spoke with Agent Paul Gustafson regarding her treatment of Plaintiff. (Exhibit C).

Now, more than two years after his May 6, 2003 appointment with Dr. Mishra, Plaintiff has commenced this lawsuit, apparently alleging that the notations in his medical record slandered and libeled him by calling him mentally ill and psychotic. (Plaintiff's

Complaint).<sup>1</sup> Allina Health Systems was not served with Plaintiff's Complaint until May 26, 2005. (See Summons and Complaint, stamped with "Acceptance of Service," attached as Exhibit F to the Semrow Affid.). Plaintiff has recently filed at least seven other Minnesota lawsuits against magicians David Copperfield, David Blaine, Fairview Health Services, Quello Clinic, Sioux Valley Hospital, and GE Medical Systems Information Technologies, Inc.<sup>2</sup>

### ARGUMENT

#### **I. MOTION TO DISMISS / SUMMARY JUDGMENT STANDARD.**

If matters outside the pleadings are presented in connection with a motion to dismiss for failure to state a claim upon which relief may be granted "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Minn. R. Civ. P. 12.02(f).

Courts should look favorably upon motions for summary judgment to further the just, speedy and inexpensive resolution of civil litigation. *Gunderson v. Harrington*, 632

N.W.2d 695, 703 (Minn. 2001). A moving party is entitled to judgment as a matter of law if "a non-moving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the non-moving party's case to permit reasonable persons to draw different conclusions." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997)

The non-moving party must produce sufficient facts to raise a genuine issue of material fact. *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988). It is not legally

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<sup>1</sup> Plaintiff's Complaint also alludes to treatment at United Hospital in the spring of 1999. Attached as Exhibit E are medical records related to Plaintiff's 1999 hospitalizations.

<sup>2</sup> The complaints filed in each of these seven lawsuits are attached as Exhibit G to the Semrow Affid.

sufficient for the non-moving party to rely upon the allegations in the pleadings, general statements of fact, or mere averments. Rather, the non-moving party must come forward with specific facts showing that there are genuine issues for trial. Minn. R. Civ. P. 56.05; *Hunt v. IBM Mid Am. Employees Fed. Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986). Moreover, the non-moving party must present evidence which is admissible at trial. *Murphy v. Country House, Inc.*, 307 Minn. 344, 349, 240 N.W.2d 507, 511 (1976). "Speculation, general assertions, and promises to produce evidence at trial are not sufficient to create a genuine issue of material fact for trial." *Nicollet Restoration, Inc. v. City of St. Paul*, 533 N.W.2d 845, 848 (Minn. 1995). If the non-moving party fails to meet its burden of coming forward with admissible evidence showing genuine issues of material fact for trial, summary judgment is mandated. Minn. R. Civ. P. 56.05; *DLH*, 566 N.W.2d at 70-71.

**II. PLAINTIFF'S LIBEL AND SLANDER CLAIMS ARE BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS IN MINN. STAT. § 541.07.**

Minnesota Statute § 541.07 provides, "Except where the Uniform Commercial Code, this section, section 148A.06, 541.05, 541.073, or 541.076 otherwise prescribes, the following actions shall be commenced within two years: (1) for libel, slander . . ." "Lack of knowledge of a defamatory publication will not toll the statute of limitations; the statute of limitations begins to run at the time of publication." *McGaa v. Glumack*, 441 N.W.2d 823, 825 (Minn. Ct. App. 1989) (citing *Wild v. Rarig*, 302 Minn. 419, 449, 234 N.W.2d 775, 794 (1975)).

There is no evidence that Allina published a false or defamatory statement to a third party. Nevertheless, even if Plaintiff could prove each element of his defamation claim, the two-year statute of limitations clearly bars Plaintiff's claims in their entirety.

Although the case was filed on May 5, 2005, Allina was not served with the Summons and Complaint until May 26, 2005, more than two years subsequent to the May 6, 2003 visit which allegedly constitutes the defamation. (See Exhibit F.)

Plaintiff provides three dates on which his alleged Complaint could presumably be based. First, Plaintiff states that he “had a conversation with Vanita Mishra, from Allina New Ulm” on May 6, 2003. Second, Plaintiff states that “most of the conversation [with Vanita Mishra on May 6, 2003] dealt with a previous incident that occurred in January 2003.” Finally, Plaintiff’s Complaint references his hospitalization at United Hospital, “Easter weekend of 1999.” It is not entirely clear which of these alleged incidents is the basis of Plaintiff’s Complaint. Regardless of which of these dates is actually relevant, the two-year statute of limitations lapsed prior to Plaintiff initiating this action. The two-year statute of limitations ran on either April 4, 2001; January 2005; or May 6, 2005. Allina was served on May 26, 2005. (See Exhibit F to the Semrow Affid.). For statute of limitations reasons, this action should be dismissed from the onset.

### **III. PLAINTIFF’S CLAIM FAILS BECAUSE HE DID NOT PLEAD DEFAMATION WITH THE REQUISITE SPECIFICITY.**

Minnesota law requires specificity in alleging defamation. *See Stead-Bowers v. Langley*, 636 N.W.2d 334, 342 (Minn. Ct. App. 2002) (affirming denial of motion to amend complaint due to failure to “specifically plead the alleged defamatory statements”); *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789, 794 (Minn. Ct. App. 1998) (limiting claim to specific statements alleged in complaint); *Benson v. Northwest Airlines*, 561 N.W.2d 530, 538 (Minn. Ct. App. 1997) (finding allegedly defamatory statements not alleged in the complaint to be beyond the scope of the claim). Thus, it is “absolutely necessary to set forth in precise words such parts or

passages as are claimed to be actionable.” *Am. Book Co. v. Kingdom Publ’g. Co.*, 73 N.W. 1089, 1090 (Minn. 1898). Paraphrasing or merely characterizing the content of statements does not suffice to plead a viable defamation claim. *Special Force Ministries*, 584 N.W.2d at 794.

Plaintiff’s only attempt at setting forth the precise words that he apparently believes are actionable relate to his conversations with Dr. Mishra, which as discussed below do not constitute publication to a third party. Plaintiff’s reference to the conversation between Dr. Mishra and Agent Gustafson merely states that “Paul [Gustafson] talked with Dr. Mishra about the incident.”

Minnesota law is unequivocal regarding the type of pleading needed to state a defamation claim sufficient to withstand a motion to dismiss. It is critical to the defense of a defamation claim to have the exact words of the statement at issue. In particular, a defamation complaint must specify the alleged defamatory comments. Plaintiff’s Complaint which merely mentions a conversation between Dr. Mishra and Agent Gustafson (to which Plaintiff consented) falls far short of the specificity necessary to plead defamation.

**IV. PLAINTIFF’S DEFAMATION CLAIM FAILS BECAUSE THERE IS NO EVIDENCE THAT ALLINA “PUBLISHED” A FALSE AND DEFAMATORY STATEMENT TO A THIRD PARTY.**

In addition to the untimely nature of the Complaint and Plaintiff’s failure to plead with specificity, this action also fails on its merits as a matter of law. To prove a defamation claim, the plaintiff “must establish that the alleged statements were made, that they were communicated to someone other than [the plaintiff], that they were false, and that, as a result, [the plaintiff’s] reputation was harmed.” *Ferrell v. Cross*, 557 N.W.2d

560, 565 (Minn. 1997). “Truth is a complete defense, and true statements, however disparaging, are not actionable.” *Tsudek v. Target Stores, Inc.*, 41 N.W.2d 466, 469 (Minn. Ct. App. 1987). Likewise, “the publication of false and defamatory matter of another is absolutely privileged if the other consents thereto.” *Otto v. Charles T. Miller Hospital*, 262 Minn. 408, 414 (Minn. 1962) (citing Restatement of Torts, § 583). Further, a communication is also privileged if it is made upon a proper occasion, from a proper motive, and is based upon reasonable or probable cause. *Id.* at 413. “When so made in good faith, the law does not imply malice from the communication itself . . . Actual malice must be proved, before there can be a recovery, and in the absence of such proof the plaintiff cannot recover.” *Id.*

**A. An Absolute Privilege Mandates Dismissal of all Claims Arising out of the Conversation with Agent Gustafson.**

Plaintiff’s Complaint states that his claims are based on Allina “calling me mentally ill and psychotic.” However, the only mention of Allina or its employees discussing Plaintiff’s medical condition with someone other than the Plaintiff himself is in reference to Dr. Mishra’s discussion with Secret Service agent Paul Gustafson. Exhibits C and D reveal that prior to talking to agent Gustafson in January 2003, Dr. Mishra obtained Plaintiff’s consent to discuss his medical condition. Thus, Plaintiff consented to the only alleged “publication” of a false or defamatory statement.

Consent to publication provides the party divulging the information with an absolute privilege which protects them from defamation claims such as the claims asserted in this case. *Otto*, 262 Minn. at 414. Therefore, because it is undisputed that Plaintiff consented to the communication between Dr. Mishra and Agent Gustafson, the

communications are entitled to an absolute privilege that summarily disposes of Plaintiff's claims.

**B. Allina Is Protected By A Qualified Privilege.**

“For a defamatory statement to be protected by a qualified privilege, the statement must be made in good faith and ‘must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause.’” *Bol v. Cole*, 561 N.W.2d 143, 149 (Minn. 1997) (citing *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 255 (Minn.1980)). “Qualified privilege applies when a court determines that ‘statements made in particular contexts or on certain occasions should be encouraged despite the risk that the statements might be defamatory.’” *Id.* (citing *Lewis v. Equitable Life Assurance Soc’y of the United States*, 389 N.W.2d 876, 889 (Minn.1986)). Again, Plaintiff only alleges that communications to persons other than himself were made on one occasion; to Agent Gustafson in January 2003, to which he consented. To the extent Plaintiff alleges that the actual medical records describing his treatment are defamatory, the communications in the medical records are entitled to a qualified privilege. *Strauss v. Thorne*, 490 N.W.2d 908, 912 (Minn. Ct. App.1992). A care provider dictating his/her analysis of a patient’s medical condition is clearly designed for a proper occasion and motive. *Id.* Consequently, that communication is qualifiedly privileged.

Notwithstanding the fact that the defamation claims fail because Allina did not disclose Plaintiff’s mental health status to anyone without his consent; as noted above, a care provider’s dictation of his/her visits is entitled to a qualified privilege. Dictation into a medical record is designed for a proper purpose and clearly encourages the type of open and frank discussion necessary for a medical provider to provide a full assessment and

evaluation of a patient's condition. As noted above, whether a qualified privilege exists is a question of law. Here, (other than the fully consented to discussion with Mr. Gustafson) there is no evidence that Allina communicated Plaintiff's medical information outside his medical records. Because publication of a health care provider's assessment and diagnosis of a patient's condition into his medical records is designed for an appropriate purpose, Allina is entitled to a qualified privilege for the purportedly defamatory statement. The qualified privilege mandates summary judgment in Allina's favor.

**C. Plaintiff Has Failed to Provide Any Evidence That Alleged Statements Made by Allina Were False.**

Truth is a complete defense to defamation allegations. *Tsudek*, 41 N.W.2d at 469. Plaintiff's medical history indicates that he has been diagnosed with significant mental health disorders. (See Exhibits A and B, and Plaintiff's own description of his medical history as it appears in the various Complaints in Exhibit G). Plaintiff has been hospitalized on a number of occasions. (Exhibit A). Plaintiff has requested and apparently been granted Social Security Disability based on his mental health disorders. (Exhibit A and Complaint). Although Plaintiff alleges he is not mentally ill for the purposes of this lawsuit, and that Defendant Allina has diagnosed his medical conditions with "absolutely no blood-work or brain scans," his medical records tell a different story. Exhibits A and B detail Plaintiff's extensive psychiatric medical history. Exhibit A states that Plaintiff has "a history of several psychiatric hospitalizations." Plaintiff's medical records reveal that Allina's treatment and diagnosis of Plaintiff were indeed accurate. Since Plaintiff sought and received disability benefits based on this diagnosis, he should

not be heard now to say that such a diagnosis was false. Thus, Plaintiff has also failed to prove the “falsity” element of his defamation claim, warranting dismissal of this case.

#### **IV. PLAINTIFF’S CLAIMS ARE BARRED BY THE IMMUNITY PROVISIONS OF THE MINNESOTA CIVIL COMMITMENT ACT.**

Finally, to the extent Plaintiff’s defamation claim somehow stems from having been hospitalized in 1999, that claim is barred by the immunity provision of the Minnesota Civil Commitment Act.

**Immunity.** All persons acting in good faith, on either actual knowledge or information thought by them to be reliable, who act pursuant to any provision of this chapter or who procedurally or physically assist in the commitment of any individual, pursuant to this chapter, *are not subject to any civil or criminal liability under this chapter.*

Minn. Stat. § 253B.23, subd. 4. Section 253B.23, subd. 4 “provides complete immunity from suit, not simply a defense to liability.” *Mjolsness v. Riley*, 524 N.W.2d 528, 530 (Minn. Ct. App. 1994).

Because immunity is such an important protection, Minnesota courts have consistently recognized that claims subject to immunity should be dismissed at the earliest stages of a lawsuit:

Questions of immunity should be resolved at the earliest possible stages of litigation. *Prompt resolution of the issue is desirable to allow persons to act independently and without fear of consequences including this burden of submitting officials to vicissitudes of trial.* It is primarily for these reasons that immunity provides immunity from suit rather than a mere defense to liability.

*Culberson v. Chapman*, 496 N.W.2d 821, 825 (Minn. Ct. App. 1993) (internal citations omitted) (construing Minn. Stat. § 148.975, reversing trial court’s denial of summary judgment).

Dismissal of actions based on the immunity provision of Minn. Stat. § 253B.23 have repeatedly been upheld by the Minnesota Court of Appeals. *See Brooks ex. rel. Brooks v. State*, 2003 WL 21743708 (Minn. Ct. App. July 29, 2003) (dismissing claims against various treatment facilities) (unpublished a copy of which is attached as Ex. H to the Semrow Affid.); *McDeid v. O'Keefe*, 2003 WL 21525128 (Minn. Ct. App. July 8, 2003) (dismissing action alleging defamation and a number of other claims stemming from commitment to the Minnesota Sex Offender Program)(unpublished a copy of which is attached as Ex. I to the Semrow Affid.).

Plaintiff states that it was around Easter 1999 that he was “initially declared mentally ill when [he] walked into Allina’s United Hospital.” His medical records indicate that he was a voluntary admission at that time, and was again hospitalized on June 19, 1999 pursuant to Minn. Stat. § 253B.23. (See Exhibit E). Plaintiff does not affirmatively state that his defamation claim is based upon his 1999 hospitalizations. However, if Plaintiff’s Complaint was interpreted to include the 1999 hospitalizations as a basis for his defamation claim, not only would the case be time barred and subject to absolute and qualified privileges, Allina also would be immune from civil liability under Minn. Stat. § 253B.23.

#### CONCLUSION

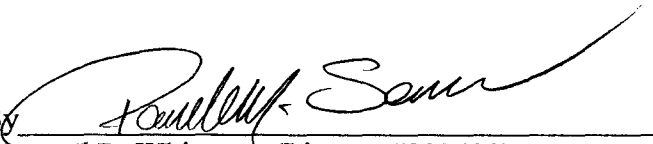
Based on the foregoing reasons Plaintiff’s claims should be dismissed with prejudice.

**ACKNOWLEDGMENT**

Defendant hereby acknowledges that sanctions may be imposed under the circumstances set forth in Minn. Stat. § 549.211.

**BASSFORD REMELE**  
*A Professional Association*

Dated: 7-22-05

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