UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

REBECCA MCNEIL, *et. al.*,

Plaintiffs,

Case No. 2:20-cv-258
JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Kimberly A. Jolson

v.

MOUNT CARMEL HEALTH SYSTEM, *et. al.*,

Defendants.

OPINION AND ORDER

The matter before the Court is Defendants Mount Carmel Health System ("Mount Carmel"), Trinity Health Corporation ("Trinity Health"), and Edward Lamb's (collectively "Defendants") Motion to Dismiss. (ECF No. 21.) Plaintiffs Rebecca McNeil, Beth Macioce-Quinn, Earlene Romine, Edward Wright, Brandi Wells, Akeela Bowens, Chad Readout, Jessica Sheets, and Deron Lundy (collectively "Plaintiffs") have responded, (ECF No. 22), and Defendants have replied. (ECF No. 23.) For the reasons stated below, Defendants' Motion to Dismiss (ECF No. 21) is **GRANTED in part** and **DENIED in part**.

I.

Plaintiffs are nine former employees of Mount Carmel who worked with and around the "now-publicly-vilified" Dr. William S. Husel. (Compl. at ¶ 1, ECF No. 8.) They have sued Defendants asserting, *inter alia*, a cause of action for defamation.[1] (Notice of Removal, ECF No. 1; Compl. at PageID# 512, ECF No. 8.) Because Defendants move to dismiss Plaintiffs'

[1] Plaintiffs assert other causes of action that are not the subject of Defendants' motion. (Compl. at PageID# 523, 524, 526, ECF No. 8.)

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defamation cause of action under Federal Rule of Civil Procedure 12(b)(6), the allegations in the Complaint are taken as true and are as follows:

During the years that Plaintiffs worked with and around Dr. Husel, some of the patients who were admitted to ICUs suffered from grave medical conditions, and occasionally the families of these patients would request for life support to be withdrawn so that the patient's suffering might be abated. (*Id.* at ¶ 2.) In preparation for cases like these, the staff of these ICUs developed policies and procedures designed to alleviate patient suffering and provide care until the end. (*Id.* at ¶¶ 3, 169.) These policies and procedures were approved by senior management at Mount Carmel and remained practically unchanged from 2014 until 2018. (*Id.* at ¶ 3.) They did not, however, include any policies or guidelines for "dosing of pain medication in connection with palliative extubation." (*Id.* at ⁋ 141 (emphasis removed).)

Mount Carmel had a system in place whereby employees could submit a "voice report" detailing any work-related concern. (*Id.* at ¶ 209.) On October 26, 2018, Katie Barga, the Vice President of Risk Management at the hospital, submitted a voice report expressing concern over Dr. Husel prescribing 1000 mcg of fentanyl during a palliative extubation of a patient the previous night. (*Id.* at ¶ 219.) On November 19, 2018, a second voice report was filed regarding Dr. Husel's ordering of 1000 mcg of fentanyl for use on a patient prior to palliative extubation. (*Id.* at ¶¶ 230, 235.) A few days later, on November 21, a pharmacist filed a third and final voice report, this one concerning Dr. Husel's written order of 2000 mcg of fentanyl for use on a patient with a significant opioid tolerance. (*Id.* at ¶¶ 264, 266.) That day, a meeting was held, including Katie Barga, Sean McKibben (President and Chief Operating Officer), Janet Whittey (Chief Pharmacy Officer), Mavis Kramer (Director of Patient Care Services), Dina Bush (Chief Nursing Officer), Dr. Larry Swanner (Vice President of Medical Affairs), and Plaintiff Romine. Following the meeting,

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McKibben instructed Dr. Swanner to place Dr. Husel on leave. (*Id.* at ¶ 268.) Dr. Swanner let Dr. Husel know soon after that he was suspended. (*Id.* at ¶ 270.)

In December of 2018, "Mount Carmel fired Dr. Husel, put 20 staff on leave, contacted a homicide detective, and called the families of 26 patients to tell each of them that their loved ones had been given a 'fatal' dose of fentanyl (even though no such thing had occurred)." (Compl. at ⁋ 29, ECF No. 8.)

On December 7, 2018, Plaintiff Romine was told she was being placed on administrative leave "while the investigation was conducted." (*Id.* at ⁋ 307.) She was briefly taken off leave on December 10, 2018, but was again placed on leave on December 21, 2018, after being told she "had 'impeaded' the hospital's own investigation." (*Id.* at ⁋⁋ 324, 395–97.)

On January 14, 2019, the CEO of Trinity Health released a statement that began:

> Mount Carmel Health…recently reported to authorities the findings of an internal investigation regarding a doctor who provided intensive care. Over the last four years, this doctor ordered significantly excessive and potentially fatal doses of pain medication for at least 27 patients who were near death. . . ."

(*Id.* at ⁋ 427.) The statement continued:

> Following the discovery, the doctor was removed from all patient care, and his employment was terminated. We're working hard to learn all we can about these cases, and we removed 20 other hospital staff from providing further patient care while we gather more facts. This includes a number of nurses who were administering the medication and a number of staff pharmacists who were also involved in the related patient care.

(*Id.*) The CEO of Mount Carmel, Edward Lamb, published a virtually identical statement that same day, while at the same time issuing a video release to the public in which he stated: "[t]he actions that created this tragedy were . . . carried out by a small number of people who made poor decisions. [W]e can't disregard colleagues ignoring policies and putting our patients' safety at risk." (*Id.* at ¶ 429.)

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Thereafter, in late January, Plaintiff McNeil was placed on leave and ultimately terminated by the hospital. (*Id.* at ¶ 444.) On January 30, Mount Carmel issued another public statement: "We have now placed 23 colleagues on administrative leave, including members of the management team." (*Id.* ¶ 458.)

Mount Carmel and Edward Lamb then issued another statement on March 13, 2019, including:

> We have identified a total of 48 nurses and pharmacists whose actions are under review and whose names have been reported to the relevant nursing and pharmacy boards. Out of an abundance of caution, we have removed all colleagues who were associated with medication administration for an impacted patient. In total, 30 colleagues are on administrative leave . . . .

(*Id.* at PageID# 541, 547). That same day Plaintiffs Bowen, Sheets, Macioce-Quinn, Wells, and Lundy had been placed on administrative leave pending the outcome of the hospital's investigation. (*Id.* at ¶ 486.) Plaintiffs Wright and Readout were not placed on administrative leave as they were former employees, (*Id.* at ⁋⁋ 52, 56), but they were "reported to the Board of Nursing in connection with Mount Carmel's announcement . . . ." (*Id.* at ⁋⁋ 636, 662).

After several months, Plaintiffs Romine, Macioce-Quinn, Bowens, Sheets, Wells, and Lundy were terminated by Mount Carmel on July 11, 2019. (*Id.* at ¶ 495.) That day, Mount Carmel and Edward Lamb issued a statement reading in part: "We are terminating the employment of 23 colleagues—including 5 physician, nursing and pharmacy management team members—effective today." (*Id.* at PageID# 550.)

II.

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 8 "does not require 'detailed factual allegations,'" but pleadings cannot consist only of "labels and conclusions," "formulaic recitation[s] of the

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elements of a cause of action," or "'naked assertion[s] devoid of "further factual enhancement."''" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007)). To survive a motion to dismiss for failure to state a claim for which relief can be granted under Federal Rule of Civil Procedure 12(b)(6), "a plaintiff must 'allege[ ] facts that "state a claim to relief that is plausible on its face" and that, if accepted as true, are sufficient to "raise a right to relief above the speculative level."''" *Mills v. Barnard*, 869 F.3d 473, 479 (6th Cir. 2017) (citation omitted). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Courts must "construe the complaint in the light most favorable to the plaintiff and accept all [well-pleaded factual] allegations as true." *Donovan v. FirstCredit, Inc.*, 983 F.3d 246, 252 (6th Cir. 2020) (quoting *Keys v. Humana, Inc.*, 684 F.3d 605, 608 (6th Cir. 2012)).

III.

To establish defamation under Ohio law, the Plaintiffs must show:

> (1) that a false statement of fact was made, (2) that the statement was defamatory, (3) that the statement was published, (4) that the plaintiff suffered injury as a proximate result of the publication, and (5) that the defendant acted with the requisite degree of fault in publishing the statement.

Am. Chem. Soc'y v. Leadscope, Inc., 978 N.E.2d 832, 852 (Ohio 2012). When spoken, a defamatory statement is slander, and when written it is libel. *Gosden v. Louis*, 687 N.E.2d 481, 488 (Ohio Ct. App. 1996). Defamation can be *per se* or *per quod*. A statement is defamatory *per se* when it is defamatory on its face, while a statement is defamatory *per quod* when the defamatory nature of the statement is implicit and comes in the form of an innuendo. *Id.*

To be actionable, the defamatory statement must be "of and concerning" an individual plaintiff. *Whiteside v. United Paramount Network*, 2004-Ohio-800, ⁋ 15, 2004 Ohio App. LEXIS

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