UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

VINCENT L. GUINN, M.D.,

Plaintiff,

v.

MOUNT CARMEL HEALTH, et al.,

Defendants.

Case No. 2:09-cv-226
JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Terence P. Kemp

OPINION AND ORDER

This matter is before the Court for consideration of Defendants' Motion for Summary Judgment (ECF No. 115) and Plaintiff's Motion for Leave to File a Surreply *Instanter* (ECF No. 142). For the reasons that follow, the Court **GRANTS IN PART AND DENIES IN PART** both motions.

I.

Plaintiff, Vincent L. Guinn, M.D., is an African American physician, who brings this action based on the permanent suspension of his privileges to engage in electrophysiology at Mount Carmel Health System hospitals. Dr. Guinn alleges that Defendants purposefully and intentionally engaged in a course of conduct to drive him from the medical field of electrophysiology and cardiac care by claiming falsely that his work relating to a particular patient fell below the applicable standard of care. Dr. Guinn contends that Defendants' motivation was to realize economic gain by excluding him as a competitor and to discriminate against him because he is an African American.

A. Parties

Dr. Guinn is a duly licensed physician permitted to practice medicine in Ohio. Dr. Guinn joined the Mount Carmel Health System medical staff in 1992. Prior to joining the medical staff at Mount Carmel, Dr. Guinn completed postgraduate medical training including completing a surgical internship, a residency in internal medicine, and three years of fellowship in cardiology and electrophysiology. Dr. Guinn became board certified in internal medicine in 1989 and certified in cardiovascular disease in 1995. He began his own medical practice in 2002, specializing in interventional cardiology and electrophysiology. Prior to opening his own medical practice, Dr. Guinn was associated with a group practice specializing in the same type of medicine.

During the relevant time period, Dr. Guinn primarily practiced medicine at Mount Carmel affiliated facilities such as Mount Carmel East and West Hospitals, St. Anne's Hospital, and the New Albany Surgical Hospital. During his tenure with Mount Carmel, Dr. Guinn served on various committees and was elected as the Chairperson of the Department of Cardiovascular Medicine in 2001 and 2002 and Vice Chairperson for the department in 1998 and 1999. Dr. Guinn was one of the first electrophysiology physicians at Mount Carmel and helped establish the electrophysiology program. Dr. Guinn also worked in the clinical residency program, helping train residents in the teaching clinic and allowing students to make rounds with him.

In addition to being part of the medical staff at Mount Carmel, Dr. Guinn was a member under contract with Mount Carmel Health Partners, Inc., an organization controlled by Mount Carmel that negotiates contracts with various insurance companies on behalf of its members. Dr. Guinn also participates with MediGold, a Mount Carmel-owned insurance program offering

advantage Medicare plans.

Dr. Guinn names as Defendants in this action Mount Carmel Health and Mount Carmel Health Systems (together "Mount Carmel"), Trinity Health Corporation ("Trinity"), and Chief Executive Officer ("CEO") of Mount Carmel Health Systems Claus Von Zychlin. Mount Carmel is an Ohio not-for-profit corporation that operates various hospitals and medical facilities in Ohio. At the time this lawsuit was filed, Trinity was the sole member of Mount Carmel.

Defendant Medard R. Lutmerding, M.D., is a physician specializing in emergency medicine with privileges to practice medicine at Mount Carmel. Dr. Lutmerding is affiliated with Defendant Emergency Services, Inc., which is an Ohio corporation that provides emergency services to patients at Mount Carmel West Hospital, Mount Carmel East Hospital, and Diley Ridge Medical Center.

Defendant Thomas R. Alexis, M.D., is a physician specializing in internal medicine with privileges to practice medicine at Mount Carmel. Defendant Douglas G. Finnie, M.D., is a physician specializing in internal medicine with privileges to practice medicine at Mount Carmel. Drs. Alexis and Finnie are affiliated with Defendant Mount Carmel Health Providers, Inc., d/b/a Big Run Internal Medicine.

Defendant Michael R. Murnane, M.D., is a physician specializing in cardiology with privileges to practice medicine at Mount Carmel. Dr. Murnane is affiliated with Defendant Columbus Cardiology Consultants, Inc., an Ohio corporation that provides cardiology services.

Defendant Barney B. Beaver, D.O., is a physician specializing in cardiology, and he previously held privileges to practice medicine at Mount Carmel. Dr. Beaver was previously

affiliated with Defendant Knollwood Physicians Group/Heart and Rhythm Specialists, which formerly provided cardiology services.

Defendant Jeffrey B. Thurston, D.O., is a physician specializing in internal medicine with privileges to practice medicine at Mount Carmel. Dr. Thurston is affiliated with Defendant Columbus Inpatient Care, Inc., an Ohio corporation that provides care to hospitalized patients at Mount Carmel West.

Defendant William J. Fanning, M.D., is a physician specializing in cardiothoracic surgery with privileges to practice medicine at Mount Carmel. Dr. Fanning is affiliated with Defendant Cardiothoracic Surgeons, Inc., an Ohio corporation that provides cardiology services.

B. Facts/Background

The parties submit hundreds of pages of briefing, citing conscientiously to dozens of depositions and properly supported evidence consisting of thousands of pages. Unless otherwise noted, the following are uncontroverted facts, viewed in the light most favorable to Dr. Guinn, as explained in the "Standard" section *infra*.

The suspension of Dr. Guinn's electrophysiology privileges centers on the care of one of his long-term patients ("P.M.") who had serious and significant medical problems. Prior to 2007, Dr. Guinn had implanted a biventricular defibrillator ("ICD") in patient P.M. When implanting an ICD device into a patient, a physician creates a "pocket" by making an incision just below the upper left shoulder. After the incision and the "ICD pocket" have been created in the patient's fatty tissue just below the skin, the physician implants the ICD device into the device pocket. This was the process followed by Dr. Guinn when he implanted an ICD device in patient P.M.

P.M. came to Dr. Guinn complaining that the ICD device appeared to be moving towards

the outer layer of the skin. This is known as a "thinning of the skin" or an "eroding of the ICD device pocket." (Guinn Dep., at 146, ECF No. 135.) The device had not actually protruded through the skin, meaning that there had been no full "erosion" of the device pocket, but instead a pending erosion. (Admission History and Physical Records, ECF No. 127 at 78) ("Thinning and pending erosion of the ICD").

Dr. Guinn scheduled P.M. to be admitted to the Mount Carmel West Electrophysiology Catheterization Laboratory ("EP Cath Lab") so that Dr. Guinn could attempt to save the ICD device pocket. Because P.M. had serious medical problems, Dr. Guinn decided that the best plan of action was to fix or "revise" the ICD pocket to avoid having P.M. undergo a more difficult operation of extracting and relocating the device.

On February 14, 2007, P.M. was admitted to the EP Cath Lab, underwent the pre-admission assessment, and was ultimately admitted to the lab and scheduled for the pocket revision procedure. The revision of the pocket was ultimately unsuccessful, and P.M. was re-admitted in March 2007 with full pocket erosion. At that time, Dr. Guinn determined that a full extraction was necessary. On March 6, 2007, Dr. Guinn re-implanted a device in the opposite side of P.M.'s chest. The procedure was performed without complication.

Dr. Guinn's decision to perform a pocket revision on P.M. came to the attention of Dr. Alexis, Co-Chair of the Cardiology Department and Co-Chair of the Medical Staff Peer Review Subcommittee as follows:

> Dr. Murnane as president of the medical staff had received a report [Dr. Alexis] believe[s] through Dr. Hackett as the director of the EP lab who received a report from perhaps a technician or other nurse level person at the EP lab that an incident had occurred where there was a *pacemaker placed in an eroded pocket*. Dr. Murnane actually relayed that information to me and asked me to look into that.

(Alexis Dep., at 74, ECF No. 129) (emphasis added).

Dr. Murnane admits telling Dr. Alexis about the "incident" but testified that he does not recall who brought the procedure to his attention. Dr. Murnane avers that it may have been his partner, Dr. Hackett, or a nurse who was working in the EP Cath Lab the day of the procedure. However, all of the nurses working that day deny that they communicated anything about the procedure to any third party. The nursing staff also denies or does not recall any improper treatment of P.M., including the use of an eroded pocket for placement of the device. (Helen Weed Dep., at 13–14, ECF No. 121; Megan Ault Dep., at 16–17, ECF No. 122; Elizabeth Siferd Dep., at 31, 37, ECF No. 126; Jason Mumford Dep., at 38, 45–46, ECF No. 127.)

Dr. Hackett, too, denies telling anyone about any concerns with Dr. Guinn's procedure on P.M. Instead, Dr. Hackett claims that he "was approached by the nurses in the electrophysiology laboratory because they had grave concerns about the care of [P.M.]." (Hackett Dep., at 66, ECF No. 128.) The nurses to whom Dr. Hackett refers was actually one nurse, Jason Mumford, who, Dr. Hackett testified, informed him of the grave concerns of the nursing staff. Dr. Hackett avers that he did not tell anyone about that conversation. Instead, he told Nurse Mumford to report it to someone else. Dr. Hackett was concerned about reporting the incident himself because he was a competitor of Dr. Guinn in the electrophysiology field. Dr. Hackett testified that he had always felt that it was best "not to take on a competitor" for "quality issues" because he would "be perceived as anti-competitive." *Id.*, at 74.

Nurse Mumford testified that he does not recall reporting anything about Dr. Guinn's treatment of P.M. to Dr. Hackt or to anyone else. He testified that during his employment at

Mount Carmel, he does not recall ever reporting a physician for a patient safety issue that occurred at the EP Cath Lab.

While it is unclear how the investigation began, it is not disputed that on March 27, 2007, the Peer Review Subcommittee met and Dr. Alexis presented his concerns regarding P.M.'s case. The meeting minutes indicate that "[i]t was noted that the Department of Cardiovascular Medicine Department Chairman [Dr. Beaver] had concerns also regarding the replacement of a lead in an infected pocket." (Peer Review Subcommittee Meeting Minutes, Pl. Mem. in Opp., Ex. G, ECF No. 120-18.) The minutes continue: "The committee members concluded that a further investigation is warranted, and that the entire chart and patterns of care be reviewed. Doctor Wise and Dr. Alexis agreed to investigate. Further information to follow." *Id.*

There is no evidence that the investigation requested by the Peer Review Committee took place, and the matter was instead advanced to the Clinical Department Council ("CDC") on April 3, 2007. At the CDC meeting that day, Dr. "Alexis reported that [Dr. Guinn] was implanting an ICD device whose previous pocket was broken down and infected." (CDC Meeting Minutes, Pl. Mem. in Opp., Ex. H, ECF No. 120-19.) Following Dr. Alexis' presentation at the CDC meeting, Dr. Lutmerding, the Chairman of the CDC, and Dr. Murnane met and "decided [they] would give Dr. Guinn the option to voluntarily surrender his [electrophysiology] device privileges at the Mount Carmel facilities until Doctor Beaver and [Dr. Lutmerding] could meet with him to talk over the issues of the case." (Dr. Lutmerding's Note to File, Defs.' Mot. for Summ. J., Ex. I, ECF No. 120-20 at 1.) They called Dr. Guinn at 8 p.m. that evening, making him the offer. Dr. Guinn was not told about the incident of concern, just that he was permitted to voluntarily relinquish his privileges because of a safety concern issue. Dr. Guinn declined but

agreed to meet the next day with Drs. Lutmerding and Beaver.

After the telephone call to Dr. Guinn, Drs. Lutmerding, Beaver, and Murnane met and discussed the situation. Dr. Lutmerding then summarily suspended Dr. Guinn's electrophysiology privileges. At approximately 8:50 p.m. the same night, Dr. Lutmerding again telephoned Dr. Guinn and informed him that his privileges were summarily suspended.

On April 4, 2007, Drs. Beaver and Lumerding met with Dr. Guinn and explained to him the CDC concerns that the procedure he performed on P.M. had created the potential for serious infection in the patient. On April 13, 2007, Mount Carmel notified Dr. Guinn in writing that the CDC had determined to summarily suspend his electrophysiology privileges. Mount Carmel informed Dr. Guinn at that time that its Medical Executive Committee ("MEC") would review the summary suspension.

On April 17, 2007, the MEC reviewed and upheld the summary suspension of Dr. Guinn's electrophysiology privileges. At that time, the MEC consisted of eight member physicians, including Drs. Lutmerding and Murnane. Drs. Alexis and Beaver attended the MEC meeting. On May 1, 2007, Mount Carmel notified Dr. Guinn of the MEC's recommendation to uphold the summary suspension of his electrophysiology privileges and informed him of his right, pursuant to the Medical Staff Bylaws, to request a hearing before an Ad Hoc Committee of the MEC.

Dr. Guinn requested a hearing before the Ad Hoc Hearing Committee, which consisted of five physicians, including Drs. Finnie and Thurston. Drs. Lutmerding, Beaver, and Fanning testified at the Ad Hoc Hearing. During the hearing, Dr. Guinn was represented by counsel and was provided with the opportunity to call witnesses, which he did, to testify on his behalf, to

introduce exhibits, and to cross-examine witnesses called by the MEC. Charles Love, M.D., FACC, FAHA, FHRS, testified on Dr. Guinn's behalf. Dr. Love is a Professor of Medicine at The Ohio State University Wexner Medical Center and the Director of Cardiac Rhythm Device Services in the Division of Cardiovascular Medicine. (Love Decl. ¶ 2, Pl. Mem. in Opp., Ex. P, ECF No. 120-27 at 1.) Dr. Love testified that it was his opinion that Dr. Guinn's decision to revise P.M.'s pocket was a proper clinical judgment, that it did not fall below the standard of care, and that it should not be a cause for suspension of a physician's electrophysiology privileges. All of Dr. Guinn's witnesses agreed that, in addition to the wound not being open, there were no clinical signs of infection.

The Ad Hoc Hearing Committee determined that the recommendation of the MEC did not lack any "substantial factual-basis or that the basis or conclusions drawn there from were either arbitrary, unreasonable, or capricious." (Findings and Recommendations, Defs.' Mot. for Summ. J., Ex. A-6, ECF No. 115-7.) On November 20, 2007, the MEC approved and ratified the recommendation of the Ad Hoc Hearing Committee and determined that the summary suspension of Dr. Guinn's electrophysiology privileges would continue. On November 29, 2007, Mount Carmel notified Dr. Guinn that the MEC, after consideration of the Ad Hoc Hearing Committee's recommendation, affirmed its decision to uphold the summary suspension and informed Dr. Guinn of his right, pursuant to the Medical Staff Bylaws, to request appellate review before the Board of Mount Carmel Health Systems.

Dr. Guinn requested a hearing before the Board of Mount Carmel Health Systems, which was held on July 14, 2008. During that hearing, Dr. Guinn was represented by counsel and was provided the opportunity to and did make oral arguments. On July 14, 2008, the Board approved

and adopted the recommendations of the MEC to deny Dr. Guinn's request for reappointment of his electrophysiology privileges.

C. Claims

On March 24, 2009, Dr. Guinn filed this action, and in his second amended complaint he alleges claims for: (1) race discrimination in violation of 42 U.S.C. § 1981; (2) conspiracy to engage in race discrimination in violation of 42 U.S.C. § 1985; (3) race discrimination in violation of Ohio Revised Code §§ 4112.02, 4112.99; (4) tortious interference with business relationships; (5) defamation; (6) antitrust violations under the Sherman Act, 15 U.S.C. §§ 1, 2; and (7) antitrust violations under Ohio's Valentine Act, Ohio Revised Code § 1331 *et seq.*

Defendants filed a Motion to Dismiss, which this Court granted in part and denied in part on February 27, 2012. (Op. and Order Granting in Part and Denying in Part Defs.' Mots. to Dismiss, ECF No. 75.) Specifically, the Court denied the motion as it related to Dr. Guinn's federal and state race discrimination claims, tortious interference with business relationships claim, and his defamation claim against Drs. Alexis, Beaver, Murnane, and Lutmerding. The Court granted the motion as it related to Dr. Guinn's federal and state antitrust claims and his defamation claim against the other Defendants.

On May 20, 2013, Defendants filed their Motion for Summary Judgment addressing all of Dr. Guinn's remaining claims. That motion is fully briefed. (ECF Nos. 120, 139.)

On August 9, 2013, Dr. Guinn filed his Motion for Leave to File a Surreply, *Instanter*. (ECF No. 142.) That motion too is ripe for review. (ECF Nos. 147, 149.)

II.

In Plaintiff's Motion to File Surreply, he asks that he be permitted to file a surreply,

instanter, to "correct several misstatements, distortions, and new additions to the factual record made for the first time in Defendants' Reply Brief in Support of Motion for Summary Judgment." (Pl.'s Mot. to File Surreply, at 1.) Defendants maintain that Dr. Guinn should not be permitted to file a surreply because it would further delay the resolution of their Motion for Summary Judgment and because the surreply "merely reargues issues that Plaintiff already addressed in Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment." (Defs.' Mem. in Opp. to Pl.'s Mot. to File Surreply, at 1–2.)

This Court agrees with Defendants that, to the extent that Dr. Guinn attempts to correct what he believes to be misstatements and/or distortions of testimony and arguments already addressed in the previous briefing, filing a surreply is not appropriate. However, to the extent that the surreply addresses theories Defendants raised for the first time in their reply brief, for example application of the economic realities test, a surreply is the appropriate means for Dr. Guinn to address them. Therefore, Plaintiff's Motion for File Surreply, *Instanter*, is **GRANTED IN PART AND DENIED IN PART** in accordance with this analysis.

III.

Defendants move for summary judgment on Dr. Guinn's race discrimination claims and his remaining tort claims.

A. Standard

Summary judgment is appropriate "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court may therefore grant a motion for summary judgment if the nonmoving party who has the burden of proof at trial fails to make a showing sufficient to establish the existence

of an element that is essential to that party's case. *See Muncie Power Prods., Inc. v. United Techs. Auto., Inc.*, 328 F.3d 870, 873 (6th Cir. 2003) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

The "party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions" of the record which demonstrate "the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (quoting Fed. R. Civ. P. 56(e)). "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255 (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Muncie Power Prods., Inc.*, 328 F.3d at 873 (quoting *Anderson*, 477 U.S. at 248). *See also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (the requirement that a dispute be "genuine" means that there must be more than "some metaphysical doubt as to the material facts"). Consequently, the central issue is "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Hamad v. Woodcrest Condo. Ass'n*, 328 F.3d 224, 234-35 (6th Cir. 2003) (quoting *Anderson*, 477 U.S. at 251-52).

B. Race Discrimination Claims

Defendants contend that they are entitled to summary judgment on Dr. Guinn's claims of race discrimination because (1) Dr. Guinn is not an employee of Defendants; (2) he has not

identified a contract subject to 42 U.S.C. § 1981; (3) Dr. Guinn's § 1981 claim does not survive, therefore neither does his claim under 42 U.S.C. § 1985; and, (4) Dr. Guinn cannot show race discrimination under the *McDonnell Douglas* burden shifting framework applicable to his race discrimination claims.

1. Ohio Revised Code Chapter 4112.02

Chapter 4112 of the Ohio Revised Code provides that it shall be an unlawful discriminatory practice for "any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter or indirectly related to employment." Ohio Rev. Code § 4112.02(A). The term "employer" within the meaning of Chapter 4112 includes "the state, any political subdivision of the state, any person employing four or more persons within the state, and any person acting directly or indirectly in the interest of an employer." Ohio Rev. Code § 4112.01(A)(1).

Defendants set forth uncontroverted evidence that Dr. Guinn was not employed by Defendants Dr. Lutmerding and Emergency Services, Inc., Dr. Alexis and Columbus Cardiology Consultants, Inc., Dr. Murnane and Columbus Cardiology Consultants, Inc., Dr. Beaver and Heart and Rhythm Specialists, Dr. Finnie and Mount Carmel HealthProviders, Inc., Dr. Thurston and Columbus Inpatient Care, Inc., and Dr. Fanning and Cardiothoracic Surgeons, Inc. (Defs' Mot. Summ. J. Exs. C, D, E, F, G, H, I; Lutmerding Decl. ¶ 3, Alexis Decl. ¶ 3, Murnane Decl. ¶ 3, Beaver Decl. ¶ 3, Finnie Decl. ¶ 3, Thurston Decl. ¶ 3, Fanning Decl. ¶ 3.) Dr. Guinn makes no argument that any of these Defendants employed him or exercised any control over his work.

Therefore, the Court **GRANTS** Defendants' Motion for Summary Judgment as it relates to Dr. Guinn's race discrimination claim under Ohio Revised Code Chapter 4112 against these Defendants

As to the remaining Defendants, Dr. Guinn argues that he should be considered their employee for the purpose of bringing a race discrimination claim under Chapter 4112. Status as an "employee" is largely dependent upon who had the right to control the manner or means of doing the work. *Shah v. Deaconess Hosp.*, 355 F.3d 496, 499 (6th Cir. 2004) (determining whether a surgeon was an employee of the hospital or an independent contractor for purpose of, *inter alia*, bringing a discrimination claim under Ohio Revised Code § 4112.02). This inquiry is fact-intensive.

The Sixth Circuit applies "the common law agency test to determine whether a hired party is an independent contractor or an employee." *Id.* (citing *Johnson*, 151 F.3d at 568 (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992); *c.f. Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440 (2003)). The common law analysis requires the consideration of numerous factors, none of which are dispositive by themselves, including:

> the hiring party's right to control the manner and means by which the product is accomplished; the skill required by the hired party; the duration of the relationship between the parties; the hiring party's right to assign additional projects; the hired party's discretion over when and how to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the hiring party's regular business; the hired party's employee benefits; and tax treatment of the hired party's compensation.
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> [*Simpson v. Ernst & Young*,] 100 F.3d [436,] 443 [(6th Cir. 1996)] (citing *Darden*, 503 U.S. at 323-24).

Shah, 355 F.3d at 499–500.

Defendants rely on *Bower v. Henry County Hosp.*, No. 13-12-46, 2013 Ohio App. LEXIS 2863, 2013 Ohio 2844 (Ohio Ct. App. July 1, 2013), for the proposition that this Court should apply an economic realities test instead of the common law agency test. Although *Shah* was issued before *Bower*, the *Shah* court recognized that there is an inconsistency in the Sixth Circuit as to which test is appropriate, stating:

> It is true that some of our cases have applied an "economic realities" test, which looks to the totality of the circumstances involved in a work relationship, including "whether the putative employee is economically dependent upon the principal or is instead in business for himself." *Lilley v. BTM Corp.*, 958 F.2d 746, 750 (6th Cir. 1992); *see also Armbruster v. Quinn*, 711 F.2d 1332, 1340 (6th Cir. 1983). But, in more recent cases, we have made it clear that we prefer the common law agency analysis. The substantive differences between the two tests are minimal. *Johnson*, 151 F.3d at 568; *Simpson*, 100 F.3d at 442-43.

Shah, 355 F.3d at 499. The Court finds it unnecessary to determine which test is applicable because under either test Dr. Guinn has raised genuine issues of material fact as to whether he should be considered an employee for purposes of bringing an Ohio race discrimination claim.

Initially, the Court addresses the fact that Dr. Guinn testified in deposition that he was not an employee of Mount Carmel. However, as this Court has previously recognized, the labels that parties assign to themselves are not dispositive as to whether a legal employee-employer relationship exists. *Reddy v. Good Samaritan Hosp. & Health Ctr.*, 137 F. Supp. 2d 948, 978 (S.D. Ohio 2001) ("this Court must determine from of the evidence before it whether a genuine issue of material fact exists as to whether Plaintiff was offered a position as an employee of AA/Northwest by looking beyond the labels 'shareholder' and 'employee' and analyzing the actual proposed relationship between those parties"). Thus, Dr. Guinn's self assessment does not prohibit him from being considered an employee.

Dr. Guinn submits evidence that Defendants continuously monitored the procedures he performed, instructed him on areas of opportunity, controlled the types of medication that he could prescribe to patients, provided the nursing/technical staff, provided all instruments he used, controlled all of the scheduling of Dr. Guinn's patients' procedures, issued "report cards" on his performance, instructed him on hospital preferred procedures and devices, created mentoring and proctoring plans to change the manner in which Dr. Guinn completed his work at the hospital, regulated the way he spoke to nursing staff, regulated the way he was allowed to behave in the hospital, owned the medical records of all Dr. Guinn's patients, and educated Dr. Guinn on times that he should do rounds.

Contrarily, Defendants submit evidence showing that they did not exert control over Dr. Guinn and did not issue or provide any employee benefits or W-2 tax forms. Additionally, Defendants contend that Dr. Guinn holds privileges at other hospitals and is not required to accept patients referred to him by Mount Carmel. Further, Defendants take issue with the degree of control Dr. Guinn asserts was exercised over him (*e.g.*, testimony of Dr. Wise and CEO Von Zychlin).

Viewing this evidence in the light most favorable to Dr. Guinn, and drawing all reasonable inferences in his favor, the Court concludes it presents a sufficient disagreement to require submission to a jury, in that there are genuine issues of material fact. Accordingly, the Court **DENIES** Defendants' Motion for Summary Judgment as it relates to Dr. Guinn's race discrimination claim under Ohio law based on its contention that Dr. Guinn is not an employee of Mount Carmel.

2. 42 U.S.C. § 1981

"'Section 1981 offers relief when racial discrimination blocks the creation of a contractual relationship, as well as when racial discrimination impairs an existing contractual relationship, so long as the plaintiff has or would have rights under the existing or proposed contractual relationship.'" *Talwar v. Catholic Healthcare Partners*, 258 F. App'x 800, 804 (6th Cir. 2007) (quoting *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006)). Defendants argue that Dr. Guinn cannot prevail on his § 1981 claim because he has not established the existence of a contractual right that was allegedly blocked or impaired by racial discrimination. Although Dr. Guinn acknowledges that he does not have a formal employment contract with Mount Carmel, he submits that he can sustain a § 1981 cause of action because (a) he has preexisting and potential contracts with patients, and (b) the Medical Staff Bylaws can be considered a contract between himself and Mount Carmel. All parties agree that Ohio law controls for the purpose of determining whether a contract exists.

a. Contract with patients and reimbursers

This Court has previously held that 42 U.S.C. § 1981 protects from discriminatory interference of a doctor's pre-existing and potential contracts with patients and reimbursers. *Reddy v. Good Samaritan Hosp. & Health Ctr.*, 137 F. Supp. 2d 948, 965 (S.D. Ohio 2000). The Court reasoned that §1981 does not expressly limit protection from discrimination between contracting parties, but rather any contract stands to be protected from discriminatory interference.

In the instant action, Dr. Guinn had existing patients with whom he had pre-existing contracts for service with MediGold. Dr. Guinn was also regularly assigned patients who came

into Mount Carmel without a pre-existing cardiologist relationship. Dr. Guinn sets forth evidence that because of the alleged discriminatory actions of Defendants, he was unable to honor the contracts with his existing patients and had to refer those patients to other physicians for treatment. Accordingly, Dr. Guinn has established the existence of a contractual relationship sufficient to support a claim under § 1981. Consequently, the Court **DENIES** Defendants' Motion for Summary Judgment as it relates to Dr. Guinn's § 1981 claim.

b. Medical Staff Bylaws

"Under Ohio law, staff bylaws may constitute a contract where 'there can be found in the bylaws an intent to be bound.'" *Talwar*, 258 F. App'x at 804 (citing *Munoz v. Flower Hosp.*, 30 Ohio App. 3d 162 (Ohio Ct. App. 1985). The law in this area, however, is not settled, as is reflected in the Sixth Circuit's brief review of it:

> For example, in *Munoz v. Flower Hospital*, the Ohio Court of Appeals considered a breach of contract claim alleged by an anesthesiologist after being denied reappointment by the defendant hospital. 507 N.E.2d at 362. The court rejected the plaintiff's contention that the hospital's staff bylaws constituted a contract because they were "subject to the ultimate authority of the applicable governing bodies," including the hospital's board of trustees. *Id.* at 365. The court concluded that "[t]he obvious interpretation of the bylaws' preamble is that the trustees are, and therefore the hospital is, not to be bound by the staff bylaws and that there is no contractual relationship arising from these staff bylaws because there is no mutuality of obligation between the parties." *Id.*; *accord Holt v. Good Samaritan Hosp. and Health Ctr.*, 69 Ohio App. 3d 439 (Ohio Ct. App. 1990); Wilkey v. McCullough-Hyde Mem. Hosp., 2007 U.S. Dist. LEXIS 79959, 2007 WL 3047234, at *10 (S.D. Ohio 2007); *Nilavar v. Mercy Health System-Western Ohio*, 494 F.Supp. 2d 604, 622-23 (S.D. Ohio 2005).
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> *But see Rahimi v. St. Elizabeth Med. Ctr., Inc.*, 1997 WL 33426269, at *6 (S.D. Ohio 1997) (unpublished) (finding staff bylaws expressed an intent to be bound where the hospital board of trustees vested a right in the medical staff to disciplinary hearing and appeal procedure, which placed an obligation on the board of trustees); *Awadalla v. Robinson Memorial Hosp.*, 1992 Ohio App. LEXIS 2838, 1992 WL 188333, at *3 (Ohio Ct. App. 1992) (unpublished) (finding staff bylaws could constitute a contract

where the chairman of the board of trustees testified "that the board never relayed to the medical staff an intention not to be bound by the bylaws").

Id. (parallel citation omitted). Moreover, "[c]ourts applying Ohio law [] have also examined extrinsic evidence to determine whether a hospital intended to be bound." *Id.* (citing *Nilavar*, 494 F. Supp. 2d at 622-23) (analyzing evidence of negotiations between hospital and plaintiff in determining whether staff bylaws constituted a contract under Ohio law).

Because of the unsettled state of the Ohio law in this area, and the fact that Dr. Guinn has already established the existence of a contractual relationship sufficient to support a claim under § 1981, the Court declines to make the determination here of whether the Medical Staff Bylaws constitute a contract between Dr. Guinn and Mount Carmel. That determination would have no effect on the survival of Dr. Guinn's § 1981 claim. Further, from the record before the Court, the damages provable as to contracts with patients and reimbursers appear to be the same as any damages for alleged breach of Medical Staff Bylaws. The Court is declining to rule on the issue of whether the Medical Staff Bylaws created a contract based upon this assumption as to damages. If this assumption is incorrect, any party may seek leave for reconsideration of this limited issue.

3. 42 U.S.C. § 1985

Section 1985(3) of Title 42 of the United States Code prohibits conspiracies to deprive persons of rights created elsewhere, such as those rights established in 42 U.S.C. § 1981. *United Bhd. of Carpenters & Joiners of Am., Local 601, AFL-CIO v. Scott*, 463 U.S. 825, 833, 103 S. Ct. 3352, 77 L. Ed. 2d 1049 (1983). No finding of race discrimination under § 1985 may be made in the absence of a finding of race discrimination on an underlying § 1981 claim. *See, e.g.,*

Jackson v. Right Assocs., 1999 U.S. App. LEXIS 1346, at *4 (6th Cir. 1999). Defendants, therefore, request summary judgment on this claim in the event that Dr. Guinn's § 1981 claim does not survive. Because this Court denied Defendants' request for summary judgment on Dr. Guinn's § 1981 claim however, it likewise **DENIES** Defendants' Motion for Summary Judgment as it relates to Dr. Guinn's § 1985 claim.

4. Race Discrimination

Dr. Guinn's race discrimination claim under Chapter 4112 of the Ohio Revised Code and his federal claim under 42 U.S.C. § 1981 are analyzed under the same standards as claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. *See Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 332 (6th Cir. 2008) ("[a]ll references throughout this opinion to Title VII are therefore equally applicable to the plaintiffs' claims under Ohio Revised Code § 4112"); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 573 n.5 (6th Cir. 2000) (noting that the elements of *prima facie* case and burdens of proof are the same for Title VII and § 1981).

To establish a discrimination claim under Title VII, "a plaintiff must either present direct evidence of discrimination or introduce circumstantial evidence that would allow an inference of discriminatory treatment." *Johnson v. Kroger Co.*, 319 F.3d 858, 864-65 (6th Cir. 2003) (citation omitted). Where, as here, a plaintiff fails to present direct evidence of discrimination, the burden shifting framework first articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and refined by *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981), applies. *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 572 (6th Cir. 2000). Under that paradigm, a plaintiff must first present a *prima facie* case of discrimination. "Once the *prima facie* case is made, a defendant may offer any legitimate, non-discriminatory reason for the

employment action, which the plaintiff may rebut by evidence of pretext; however, the burden of proof always remains with the plaintiff." *Hartsel v. Keys*, 87 F.3d 795, 800 (6th Cir. 1996) (citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993)).

a. *Prima facie* case

"[T]o establish a *prima facie* case of discrimination by the defendant, 'the plaintiff must show (1) that he is a member of a protected group, (2) that he was subject to an adverse employment decision, (3) that he was qualified for the position, and (4) that he was replaced by a person outside of the protected class. . . . the fourth element may also be satisfied by showing that similarly situated non-protected employees were treated more favorably.'" *Clayton v. Meijer, Inc.*, 281 F.3d 605, 610 (6th Cir. 2002) (alteration in original) (quoting *Talley v. Bravo Pitino Rest., Ltd.*, 61 F.3d 1241, 1246 (6th Cir. 1995)). Defendants take issue only with the fourth element.

As to the similarly situated inquiry, the Sixth Circuit "first explained in *Mitchell*, 'it is fundamental that to make a comparison of a discrimination plaintiff's treatment to that of non-minority employees, the plaintiff must show that the "comparables" are similarly situated in all respects.'" *Clayton*, 281 F.3d at 610–11 (citing *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992) (emphasis in original)). "As further explained in *Ercegovich*, 'the plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered "similarly-situated"; rather . . . the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in all of the *relevant* aspects.'" *Id.* at 611 (citing *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998) (emphasis in original) (citation omitted)). Finally, in *Perry*, the Sixth Circuit

"explained that 'this Court has asserted that in applying the standard [that plaintiff must show that she is treated less favorably than similarly situated employees from outside the protected class] courts should not demand exact correlation, but should instead seek relevant similarity.'" *Id.* (citing *Perry v. McGinnis*, 209 F.3d 597, 601 (6th Cir. 2000) (bracket addition in original)).

In the case *sub judice*, Dr. Guinn compares himself to Defendant Dr. Murnane[1] and argues that he, a non-minority, was treated more favorably than was Dr. Guinn. Defendants argue that Dr. Murnane is not similarly situated.

Dr. Murnane and Dr. Guinn are both physicians specializing in cardiology with privileges to practice medicine at Mount Carmel. Both doctors performed procedures in the EP Cath Labs., where Dr. Guinn treated P.M. and Dr. Murnane performed a procedure that resulted in the death of his patient. Dr. Murnane performed the procedure approximately two years before Dr. Guinn performed the procedure on P.M. Both doctors had the procedure reviewed by a peer committee.

The peer committee reviewing Dr. Murnane's procedure sent him a letter indicating that the committee "would not have done this procedure." (Auerback[2] Dep., at 21, ECF No. 123.) Because Dr. Murnane "wanted to personally present his side of the issue" to the committee, he was permitted to do. *Id.* at 20. The committee found that there was a "reasonable difference of opinion" between the committee members' opinion regarding the procedure and Dr. Murnane's

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[1]Dr. Guinn also compares himself to Ralph Lach, M.D. Defendants have filed a motion *in limine* directed at Dr. Lach and other individuals whom they believe Dr. Guinn intends to call at trial for a comparison of Defendants' treatment of them and Dr. Guinn. Because the Court finds that Dr. Murnane is similar in all relevant respects, it leaves for another day the determination of whether Dr. Lach may be considered comparable for this analysis.

[2]Bruce Auerback, M.D., is the Chairman of the Percutaneous Coronary Intervention, Cath. Lab Quality Assurance Committee.

opinion. There was no further action taken against Dr. Murnane. In contrast, the peer committee reviewing Dr. Guinn's procedure did not send him a letter nor contact him in any way to indicate that it was investigating his choice to perform a procedure on P.M. Also in contrast, Dr. Guinn requested the opportunity to address the committee and was not permitted to do so. Further, the Peer Review Committee suggested further action, *i.e.*, an investigation, which was not done. Instead, the collegial peer review protocol was skipped and the matter was sent directly to the CDC.

Defendants argue that regardless of the similarities between the two doctors, the disparate treatment is explained because "[t]here are two important differences between the circumstances involving Dr. Murnane and the circumstances involving Plaintiff: (1) the manner in which the patient-care matter was brought to Mount Carmel's attention and (2) the conclusions reached by the committee(s) that considered the patient-care matters." (Defs.' Reply Brief, at 19.)

As to the first difference, Defendants posit that in Dr. Murnane's case, the patient care matter was not reported to a peer review committee by anyone expressing concerns regarding the care that was rendered. Rather, the committee "reviewed the matter in the normal course of that committee's duties, which include reviewing all deaths that occurred in the" Cath Lab. *Id.* (citing Auerbach Dep., at 21) ("The committee routinely reviews every death in the cath lab and Dr. Murnane had a death in the cath lab . . . .") In contrast, Defendants continue, "the corrective action process involving Plaintiff was initiated as the result of 'grave concerns' expressed by Drs. Alexis and Murnane and the CDC concerning 'imminent danger' posed to patients as a result of the care that Plaintiff had rendered to a patient." *Id.* (citing Murnane Dep., at 106-107, 122; Lutmerding Dep., at 130-131, 137; Alexis Dep., at 99, 141.)

First, the Court notes that the testimony upon which Defendants rely is far from clear as to *who* expressed grave concerns over Dr. Guinn's pocket revision on P.M. As set forth *supra*, Dr. Hackett testified that Nurse Mumford expressed the grave concern, but Mumford denies that he did so. Also, Dr. Murnane does not recall where he heard about the incident, but also believes that it was an EP Cath Lab employee or Dr. Hackett–all of whom deny reporting such to Dr. Murnane. Further, the Court is unconvinced by Defendants' underlying suggestion that Dr. Guinn's performance issue was of a more serious nature than was Dr. Murnane's. Dr. Murnane was investigated for a procedure that resulted in the death of a patient, certainly an issue of grave concern to Mount Carmel.

As to the second difference, Defendants assert that the committees that reviewed the incidents "reached very different conclusions[,]" finding Dr. Murnane's actions not unreasonable and Dr. Guinn's as falling below the standard of care to which he was subject. (Defs' Reply at 19–20.) This difference, however, is exactly what Dr. Guinn complains about. That is, Dr. Guinn contends that the investigation of him was initiated by use of untruthful accusations that are unsupported by the medical records, did not follow the suggestions of the Peer Review Committee, skipped the collegial peer review process, and then continued to be unfairly examined in the review process because he is an African American, as compared to the appropriate initiation and review given to Dr. Murnane, a Caucasion.

The Court concludes that the evidence submitted supports a finding that Dr. Murnane is similarly situated in the relevant aspects necessary to be an appropriate comparator for Dr. Guinn in the instant analysis.

b. Legitimate nondiscriminatory reason and pretext

Defendants contend that they revoked Dr. Guinn's electrophysiology privileges based on poor performance. Poor performance is "a legitimate nondiscriminatory reason for terminating a person's employment and, by articulating such a reason, [Defendants have] met [their] initial burden under the *McDonnell Douglas/Burdine* framework." *Imwalle v. Reliance Med. Prod., Inc.*, 515 F.3d 531, 546 (6th Cir. 2008); *see also Mary's Honor Center v. Hicks*, 509 U.S. 502, 514 (1993) (the defendant need not prove a nondiscriminatory reason for the adverse action, but need merely articulate a valid rationale).

Therefore, the burden, of production and persuasion, shifts to Dr. Guinn to show that Defendants' reason for revoking his privileges is a pretext for race discrimination. "Under the law of our circuit, a plaintiff can show pretext in three interrelated ways: (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate the employer's action, or (3) that they were insufficient to motivate the employer's action." *Chen v. Dow Chem. Co.*, 580 F.3d 394, 400 (6th Cir. 2009) (citing *Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 460 (6th Cir. 2004)). To carry his burden in opposing summary judgment, Dr. Guinn must produce sufficient evidence from which a jury could reasonably reject Defendants' explanation of why it revoked his privileges. *Id.* (citing *Mickey v. Zeidler Tool and Die Co.*, 516 F.3d 516, 526 (6 th Cir. 2008); *Braithwaite v. Timken Co.*, 258 F.3d 488, 493-94 (6th Cir.2001)).

Dr. Guinn asserts that Defendants' legitimate nondiscriminatory reason for revoking his privileges is a pretext for race discrimination because it is unworthy of credence. Dr. Guinn invokes the law related to the honest belief rule, which provides that "[w]hen the employee is able to produce sufficient evidence to establish that the employer failed to make a reasonably

informed and considered decision before taking its adverse employment action, thereby making its decisional process 'unworthy of credence,' then any reliance placed by the employer in such a process cannot be said to be honestly held." *Smith v. Chrysler Corp.*, 155 F.3d 799, 807-08 (6th Cir. 1998).

Dr. Guinn's peer review expert, Todd Sagin, M.D., J.D., reviewed extensively the procedure utilized by Mount Carmel in its revocation of Dr. Guinn's privileges, the depositions filed in support and in opposition to Dr. Guinn's claims in this action, years of records of committee reviews at Mount Carmel, and also interviewed numerous physicians. Dr. Sagin concluded that "the process followed in suspending Dr. Guinn's privileges was flawed in its entirety and that Dr. Guinn was treated unfairly and differently from similarly situated white physicians." (Sagin Decl. ¶ 4; Sagin Expert Report; ECF No. 120-3.) Sagin further opined:

> [T]he peer review process involving Dr. Guinn's care of [P.M.] on 2/14/2007 was characterized by misrepresentation of information, failure of even the most basic diligence, a stunning willingness of players to accept assertions not based on written medical records or first hand observation, deliberate bypassing of thoughtful recommendations by the medical staff peer review committee, an unwillingness to engage in the most basic steps of fairness . . . .
>
> All of these lapses appear to be a gross deviation from the practice of peer review as applied to other members of the Mount Carmel Health medical staff. As you would expect on any medical staff, concerns about medical staff members were not an uncommon occurrence at Mount Carmel Health. But most of the doctors who were deposed in this matter could not remember another occasion where a doctor had been summarily suspended. It clearly is a highly unusual event in the history of this institution. When a peer review body found Dr. Murnane's care of a patient inappropriate in a matter brought to them because of the patient's death, no one suggested summary suspension or rushed the matter to the CDC or MEC. Dr. Murnane was given an opportunity to provide his explanation of events, as was proper.

Id. at 52.

Dr. Sagin continues in his report that the suspension of Dr. Guinn's privileges was not warranted by a reasonable assessment of the facts, because it was an excessive response to the available information. The initiation of action against Dr. Guinn and the perpetuation of the suspension by the Defendants was based upon one incident, which his investigation claimed was created and set in motion by Dr. Murnane. Finally, Sagin submits that he is "hard pressed to envision another medical staff that would not find that the MEC at Mt. Carmel Health made a recommendation that lacked '. . . any substantial factual basis or that such basis or the conclusions drawn therefrom are either arbitrary, unreasonable or capricious.'" *Id.* at 19–20.

With their Reply Brief, Defendants submit the report of their hospital peer review expert, Mary Baker, DHA, CPMSM, CPCS, who concluded that taking immediate action instead of attempting collegial intervention is not unreasonable when potentially harmful patient-care issues are reported. (Baker Decl., Ex. 2; ECF No. 139-29.) Baker opined that Defendants acted reasonably when they suspended Dr. Guinn's electrophysiology privileges.

Although the Sixth Circuit has "oft times repeated, 'it is inappropriate for the judiciary to substitute its judgment for that of management,'" the Court here finds that the evidence is not so one-sided as to require a finding that the investigation of Dr. Guinn was not a pretext for discrimination with regard to Mount Carmel, Trinity, CEO Von Zychlin in his official capacity, and Drs. Murnane, Alexis, Lutmerding, and Beaver. *See Hedrick v. W. Reserve Care Sys.*, 355 F.3d 444, 462 (6th Cir. 2004) (citations omitted). Reviewing all of the evidence before it, the Court finds that Dr. Guinn has raised genuine issues of material fact as to whether these Defendants made a reasonably informed and considered decision before revoking Dr. Guinn's electrophysiology privileges. However, the same is not true of CEO Von Zychlin in his personal

capacity, and Drs. Thurston, Finnie, and Fanning. There is simply no evidence upon which Dr. Guinn relies that creates a genuine issue of material fact at to these Defendants.

In reviewing all of the evidence before it in the light most favorable to Dr. Guinn, and drawing all justifiable inferences in his favor, the Court concludes that Defendants' less favorable treatment of Dr. Guinn than a similarly situated white coworker, the dueling expert reports on the topic, the deposition testimony from Dr. Guinn's peers that his summary suspension was uncommon and extraordinary, presents enough for a jury to reasonably reject Defendants' explanation and permits, but does not require, the factfinder to infer pretext and illegal race discrimination from Dr. Guinn's *prima facie* case.

Consequently, the Court **GRANTS** Defendants' Motion for Summary Judgment as it relates to Dr. Guinn's race discrimination claims against CEO Von Zychlin in his personal capacity, Dr. Thurston and Columbus Inpatient Care, Inc., Dr. Fanning and Cardiothoracic Surgeons, Inc. and Dr. Finnie.

C. Tort Claims

All parties agree that Dr. Guinn's claims for tortious interference with business relationships and defamation are subject to the immunity provisions in the Health Care Quality Improvement Act ("HCQIA"), 42 U.S.C. § 1101 *et seq.* and Ohio's counterpart found at Ohio Rev. Code § 2305.251(A). Pursuant to these statutes, Defendants maintain that they are immune from Dr. Guinn's two tort claims.

In 1986 Congress adopted the HCQIA, "in response to the 'increasing occurrence of medical malpractice and the need to improve the quality of medical care in the United States.'" *Fox v. Parma Cmty. Gen. Hosp.*, 160 Ohio App. 3d 409, 415 (Ohio Ct. App. 2005) (citing 42

U.S.C. § 11101(1)). "The purpose of the statute is to provide for effective peer review and monitoring of physicians." *Id.* (citing, *inter alia*, Meyers v. Columbia/HCA Healthcare Corp. (6th Cir., 2003)).

In furtherance of this goal, the HCQIA grants immunity from actions for damages to participants in medical peer review activities. *See* 42 U.S.C. § 11111; *see also Gureasko v. Bethesda Hospital*, 116 Ohio App.3d 724 (Ohio Ct. App. 1996) (Ohio Revised Code § 2305.251 likewise provides immunity to members of professional review committees). The HCQIA provides that a professional review body taking a professional review action shall not be liable in damages under any law of the United States or of any State with respect to the action. 42 U.S.C. § 11112(a). Immunity is also granted to those individuals "providing information to a professional review body regarding the competence or professional conduct of a physician . . . unless such information is false and the person providing it knew that such information was false." 42 U.S.C. § 11111(a)(2).

Finally, the HCQIA contains the following rebuttable presumption of immunity: "A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence." 42 U.S.C. § 11112(a). "That is, the plaintiff must demonstrate that one of the requirements for immunity was not met." *Fox*, 160 Ohio App.3d at 418 (citation omitted). "Thus a somewhat unconventional standard is applied in ruling upon a motion for summary judgment -- whether a reasonable jury, viewing all facts in a light most favorable to the plaintiff could conclude that he demonstrated by a preponderance of the evidence, that the defendants' actions fell outside the scope of section 11112(a)." *Id.* (citing, *inter alia*, 42 U.S.C. §

11112(a)).

> Qualifying "professional review actions" are those taken:
>
> "(1) in the reasonable belief that the action was in the furtherance of quality health care,
>
> "(2) after a reasonable effort to obtain the facts of the matter,
>
> "(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> "(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3)."

Id. at 416 (quoting 42 U.S.C. ss 11112(a)).

Defendants argue that they are entitled to immunity because Mount Carmel determined to suspend Dr. Guinn's electrophysiology privileges based upon a reasonable belief that the suspension furthered quality health care and that the suspension was warranted by the facts known to Mount Carmel after it made a reasonable effort to obtain the facts surrounding the Dr. Guinn's care of P.M. In addition, Mount Carmel contends that it provided adequate notice and hearing procedures to Dr. Guinn that complied with the Fair Hearing Plan set forth in the Bylaws. This Court agrees, except with regard to Dr. Murnane.

Dr. Murnane initiated the investigation and review proceedings into Dr. Guinn's treatment of P.M. Dr. Murnane admits that he informed Dr. Alexis that Dr. Guinn had placed a pacemaker in an eroded pocket. Dr. Murnane does not contend that he viewed the records of the procedure and made an error, but instead claims that he was informed by either Dr. Hackett or a nurse at the EP Cath Lab, all of whom deny reporting this to Dr. Murnane. The Court

emphasizes that if Dr. Murnane made an error in judgment or acted negligently, he would likely be entitled to immunity. Here, however, Dr. Murnane reported specific information about Dr. Guinn, that information was false, and he cannot point to the source of the information. Therefore, the Court finds that a reasonable jury could conclude that Dr. Guinn demonstrated by a preponderance of the evidence that Dr. Murnane's actions fell outside the scope of § 11112(a).

However, the same is not true of the other Defendants. Dr. Guinn argues that these "Defendants have failed to satisfy the requirements for immunity under HCQIA, because there was no reasonable effort to obtain the facts in peer review." (Pl.'s Mem. in Opp. to Defs.' Mot. for Summ. J., at 53.) However, it is not Defendants' burden to satisfy the requirements for immunity. Instead, this Court must presume that Defendants made a reasonable effort to ascertain the facts of the matter before the professional review action was taken. It is Dr. Guinn's burden to rebut this presumption.

Indeed, this Court must presume that (1) the "reviewers, with the information available to them at the time of the professional review action, would reasonably have concluded that their action would restrict incompetent behavior or would protect patients." *Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461, 468 (6th Cir. 2003) (citations omitted); (2) that the action was taken after a reasonable effort to obtain the facts, *id.* 468 (the HCQIA does not require a comprehensive examination to satisfy this inquiry); (3) that Dr. Guinn received adequate notice and hearing procedures, which is evident here, and (4) that "the professional review action was taken in the reasonable belief that the action was warranted by the facts known after a reasonable effort to obtain those facts," *id.* at 471 (a plaintiff's showing 'that [the] doctors reached an incorrect conclusion on a particular medical issue because of a lack of understanding' does not

'meet the burden of contradicting the existence of a reasonable belief that they were furthering health care quality in participating in the peer review process) (citations omitted). Viewing the evidence through this paradigm, and in the light most favorable to Dr. Guinn, the Court concludes that Dr. Guinn has failed rebut the presumption afforded to the remaining Defendants under the HCQIA.

Accordingly, the Court **GRANTS** Defendants' Motion for Summary Judgment on Dr. Guinn's tort claims based on the grant of immunity under the HCQIA and Ohio Revised Code § § 2305.251(A) as it relates to all Defendants except Dr. Murnane, for which the motion is **DENIED**.

1. Intentional Interference with Business Relationships

Dr. Guinn contends that Dr. Murnane tortiously interfered with his business relationships so that Murnane could eliminate him as a competitor and have access to his current and future patients. "Under Ohio law, '[t]he tort of interference with a business relationship occurs when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relationship with another.'" *Harris v. Bornhorst*, 513 F.3d 503, 523 (6th Cir. 2008) (quoting *McConnell v. Hunt Sports Enters.*, 132 Ohio App. 3d 657, 689 (Ohio Ct. App. 1999) (bracket in original)). "'The elements of tortious interference with a business relationship are (1) a business relationship, (2) the wrongdoer's knowledge thereof, (3) an intentional interference causing a breach or termination of the relationship, and (4) damages resulting therefrom.'" *Id.* (quoting *McConnell*, *supra*).

Dr. Murnane contends that he is entitled to summary judgment on this claim because Dr. Guinn "cannot prove that, when Mount Carmel suspended Plaintiff's EP privileges, any of

Defendants intended to cause Plaintiff's patients to discontinue their business relationships with Plaintiff. To the contrary, the evidence establishes that Mount Carmel's intent in suspending Plaintiff's EP privileges was to guard patient safety." (Defs.' Mot. for Summ. J., at 30.) Defendants further argue that their participation in the peer review process that culminated in the suspension of Dr. Guinn's electrophysiology privileges at Mount Carmel is qualifiedly privileged and cannot be the subject of a claim for tortious interference with business relationships. Last, Defendants maintain that Dr. Guinn "cannot demonstrate that Defendants' alleged interference with the relationships that Plaintiff had with his patients proximately caused any damage to Plaintiff." *Id.* at 31. This Court, however, disagrees as these arguments relate to Dr. Murnane.

First, the Court concluded *supra* that Dr. Guinn has raised genuine issues of material fact as to whether Defendants made a reasonably informed and considered decision before revoking Dr. Guinn's electrophysiology privileges. That entire process was started based on Dr. Murnane's conveyance of information about Dr. Guinn's treatment of P.M. that was at least partially untrue. Further, it is not disputed that Dr. Murnane competes with Dr. Guinn and that Dr. Murnane was negotiating the sale of his practice to Mount Carmel sometime between 2007 and 2008–the time period Dr. Guinn was engaged in the peer review process at issue in this action. (Murnane Dep. at 21) (Mount Carmel purchased Columbus Cardiology Consultants, closing June 23, 2008). Viewing this evidence in a favorable light to Dr. Guinn and drawing all justifiable inferences in his favor, a reasonable jury could find, or not find, that it was Dr. Murnane's intention to cause Dr. Guinn to discontinue his business relationships with clients and potential clients.

As to damages, Defendants contend that other factors besides Dr. Guinn's loss of

privileges at Mount Carmel may have caused Dr. Guinn to lose business. Even if this is true, it does not mean that Dr. Guinn suffered no damages from his loss of business at Mount Carmel. Indeed, Dr. Guinn testified that most of his practice was in electrophysiology and conducted at Mount Carmel. There is sufficient evidence here to take the issue of damages to the jury.

Finally, with regard to privilege, Defendants are correct that statements "made to an interested entity at that entity's request and [that are] limited in scope to [the entity]'s inquiry" are privileged. *Vistein v. Am. Registry of Radiologic Technologists*, 342 Fed. Appx. 113, 129 (6th Cir. 2009) (applying Ohio law) (holding that the defendant national credentialing agency and registry did not tortiously interfere with the plaintiff radiologic technologist's business relationships when the defendant reported to other agencies that the plaintiff had submitted a false document). Here, however, it is not disputed that Dr. Murnane provided the information on his own accord, not based upon the request of any committee. Therefore, Dr. Murnane is not entitled to summary judgment based on his contention that his involvement in reviewing and suspending Dr. Guinn's privileges is privileged.

Accordingly, the Court **DENIES** Defendants' Motion for Summary Judgment as it relates to Dr. Guinn's tortious interference with business relationships claim against Dr. Murnane.

2. Defamation

"Defamation is a 'false publication that injures a person's reputation, exposes him to public hatred, contempt, ridicule, shame or disgrace, or affects him adversely in his trade or business.'" *Knox v. Neaton Auto Prods. Mfg.*, 375 F.3d 451, 460 (6th Cir. 2004) (citing *Sweitzer v. Outlet Communs., Inc.*, 133 Ohio App. 3d 102, 108 (Ohio Ct. App. 1999).

The essential elements of a claim for defamation under Ohio law are: (1) the

> defendant made a false statement, (2) that false statement was defamatory in the sense that it reflected unfavorably of the plaintiff's character or injured his trade or business, (3) the statement was published or communicated, and (4) the defendant acted with the necessary degree of fault.

Fuchs v. Scripps Howard Broadcasting Co., 170 Ohio App. 3d 679, 691 (Ohio Ct. App. 2006).

Dr. Guinn sets forth evidence of statements made by Dr. Murnane about Dr. Guinn's procedure implanting an ICD in a fully eroded pocket. Dr. Guinn argues that these statements are false, as is shown by the records from the EP Cath Lab that indicates that there was no open wound and that the pocket was not fully eroded.

Defendants argue that statements to the peer review committees are qualifiedly privileged because they were made in good faith and in the interest of protecting patient safety. "A communication made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, even though it contains matter which, without this privilege, would be actionable, and although the duty is not a legal one, but only a moral or social duty of imperfect obligation." *Hahn v. Kotten*, 43 Ohio St. 2d 237, 246 (1975). The concept of a qualified privilege is based upon public policy and the need to protect the publication of a communication made in good faith. *Id.*, at 245-246.

Dr. Guinn maintains that Dr. Murnane's statements were not made in good faith, or there is at least an issue of material fact as to whether the statements were made in good faith, as is shown by the fact that the statements contradict the medical records. This Court agrees. The determination of whether these Dr. acted in good faith so that he may enjoy the protection of the defense of qualified privilege is one that is appropriate for the jury.

Defendants further contend that Dr. Guinn cannot prove that the statements were false because, "[b]ased on the record before the various peer-review committees involved in suspending Plaintiff's EP privileges, those committees concluded that '[a]n erosion should be treated as an infection until proven otherwise by blood cultures, and that '[i]t was clear from the evidence that a physician should not reimplant a device if there is a suspicion of infection.'" (Defs.' Mot. for Summ. J. at 27) (citations omitted). Based on this assertion, Defendants conclude that "there is no evidence to suggest that any statements allegedly made by any of the Defendants regarding Plaintiff having implanted the ICD in a pocket that may have been infected were false." *Id.*

While Defendants' statement may be accurate, it misses the mark. That is, the conclusion made by the peer review committees upon which Defendants rely does not eradicate the evidence presented by Dr. Guinn, nor does it conflict with it. The peer review committees' conclusion that an erosion should be treated as an infection does not change Dr. Murnane's statements that did not relate to an infection, but rather were that Dr. Guinn implanted a device in an eroded pocket. Those statements do not invoke medical judgment and are in direct conflict with the medical records. There is no dispute that the medical records reflect that P.M. had a pending erosion–not an eroded pocket or an open wound. All parties agree that a pending erosion and an erosion are two different medical diagnoses, with the former causing no break in the skin and the later causing a break in the skin or an open wound. Dr. Guinn has, therefore, presented sufficient evidence that a jury could find in his favor on his defamation claim against Dr. Murnane.

Accordingly, the Court **DENIES** Defendants' Motion for Summary Judgment as it relates to Dr. Guinn's defamation claim against Dr. Murnane.

IV.

Based on the foregoing, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiff's Motion for Leave to File a Surreply, *Instanter* (ECF No. 142) in accordance with this Opinion and Order. The Court also **GRANTS IN PART AND DENIES IN PART** Defendants' Motion for Summary Judgment (ECF No. 115) as follows:

1. The Court **GRANTS** the motion as it relates to Dr. Guinn's race discrimination claim under Ohio Revised Code Chapter 4112 against Dr. Lutmerding and Emergency Services, Inc., Dr. Murnane and Columbus Cardiology Consultants, Inc., Dr. Beaver and Heart and Rhythm Specialists, Dr. Finnie and Dr. Alexis and Mount Carmel HealthProviders, Inc., Dr. Thurston and Columbus Inpatient Care, Inc., and Dr. Fanning and Cardiothoracic Surgeons, Inc.

2. The Court **DENIES** the motion as it relates to Dr. Guinn's race discrimination claim under Ohio law based on their contention that Dr. Guinn in not an employee of Mount Carmel or Trinity.

3. The Court **GRANTS** the motion as it relates to Dr. Guinn's race discrimination claims under 42 U.S.C. §§ 1981 and 1985 as they relate to CEO Von Zychlin in his personal capacity, Dr. Thurston and Columbus Inpatient Care, Inc., Dr. Fanning and Cardiothoracic Surgeons, Inc. and Dr. Finnie, and **DENIES** the motion as it relates to Mount Carmel, Trinity, CEO Von Zychlin in his official capacity, Drs. Lutmerding, Alexis, Murnane, and Beaver and their practices Emergency Services, Inc., Mount Carmel Health Providers, Inc., Columbus Cardiology Consultants, Inc., and Knollwood Physicians Group/Heart and Rhythm Specialists.

4. The Court **GRANTS** the motion as it relates to Defendants' claim to immunity from tort under the HCQIA and Ohio Revised Code § 2305.251(A), except Dr. Murnane, for which the

motion is **DENIED**.

5. The Court **DENIES** Defendants' Motion for Summary Judgment as it relates to Dr. Guinn's intentional interference with business relationships claim against Dr. Murnane.

6. The Court **DENIES** Defendants' Motion for Summary Judgment as it relates to Dr. Guinn's defamation claim against Dr. Murnane.

IT IS SO ORDERED.

8-29-2013
DATE

EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE