[Cite as *Lemay v. Univ. of Toledo Med. Ctr.*, 2017-Ohio-7542.]

MELANIE LEMAY, et al. Plaintiffs v. UNIVERSITY OF TOLEDO MEDICAL CENTER Defendant	Case No. 2016-00860 Judge Dale A. Crawford DECISION

{¶1} On March 31, 2017, Defendant University of Toledo Medical Center (UTMC) filed a Motion for Summary Judgment pursuant to Civ.R. 56(B). Plaintiffs Melanie and Patrick Lemay filed an untimely response on April 27, 2017.[1] The motion is now before the Court for a non-oral hearing pursuant to L.C.C.R. 4(D).

I. Prior procedural and factual history

{¶2} This case involves Ms. Lemay's termination by UTMC on September 12, 2012, following the accidental disposal of a kidney meant for transplant. On August 12, 2012, around noon, Ms. Lemay was working in the operating room (OR) during a live kidney transplant as a circulating nurse to relieve Nurse Judith Moore for lunch. Prior to taking her lunch, Ms. Moore gave Ms. Lemay a status update and noted the surgeon in charge had taken out the donor kidney, cleaned it, and placed it in an apparatus for cooling. Ms. Moore failed to log out when she left the OR and Ms. Lemay also failed to log into the computer system. Entries made by Ms. Lemay thereafter were reflected under Ms. Moore's chart.

{¶3} When Ms. Moore returned from her lunch, she did not approach Ms. Lemay for a status update and Ms. Lemay also did not approach Ms. Moore to provide an

[1] *See* L.C.C.R. 4(C). Even though Plaintiffs filed an untimely response without leave, the Court has considered it in formulating this decision because UTMC did not object to the filing.

update. Ms. Lemay did not log in Ms. Moore's return or log herself out. Upon a surgical technician's request, Ms. Lemay left the operating room to procure some medical supplies. When Ms. Lemay returned, she observed Ms. Moore cleaning off the sterile prep table used to clean the donor kidney. Ms. Lemay assumed Ms. Moore had obtained necessary permission to clean off the sterile prep table. Consequently, she resumed charting, which, as noted above, was being reflected under Ms. Moore's chart. At this point, Ms. Moore removed the cooling bin which contained the kidney, transported it out of the OR, and deposited it into a machine to dispose of the contents. Physicians attempted to resuscitate the kidney, but the organ was rendered unusable.

{¶4} Following the incident, Ms. Lemay was placed on paid administrative leave, pending an investigation. On September 11, 2012, UTMC held a pre-disciplinary hearing pursuant to a contract arising out of a collective bargaining agreement (CBA) with UTMC. As a result of the hearing, UTMC terminated Ms. Lemay via a letter dated September 12, 2012.

{¶5} Plaintiffs previously filed claims for wrongful termination and defamation, as well as loss of consortium stemming from the defamation claim on behalf of Ms. Lemay's husband, in this Court on August 2, 2013. *See Lemay, et al. v. University of Toledo Medical Center,* Ct. of Claims No. 2013-00451 (Jan. 15, 2014). In that case, the Court dismissed the wrongful termination claim because Ms. Lemay's employment with UTMC was governed by the CBA with UTMC. Accordingly, the Court directed the parties to the CBA to determine the applicability of its arbitration provision and the required administrative procedures for Ms. Lemay's grievances. The Court also ordered Plaintiffs to file a more definite statement, pursuant to Civ.R. 12(E), with regard to the defamation and connected loss of consortium claims. The Court determined that while there was no absolute privilege for the statements made to the media by UTMC's agents, qualified privilege could apply depending on the process by which these statements were made and the content of the statements themselves. Ultimately,

Plaintiffs filed a voluntary dismissal with this Court on November 25, 2015. Plaintiffs filed the present case, pleading claims for wrongful termination and defamation again, on November 22, 2016.

II. Summary Judgment standard

{¶6} Under Civ.R. 56(C), summary judgment is proper "if the pleadings, depositions, answer to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Thus, to determine whether Defendant is entitled to judgment as a matter of law pursuant to Civ.R. 56(C), the Court must ascertain whether the evidentiary materials presented by Defendant show that there is no genuine issue as to any material fact involved in the case. In making this determination, it is necessary to analyze the landmark Ohio Supreme Court decision which addresses the "standards for granting summary judgment when the moving party asserts that the nonmoving party has no evidence to establish an essential element of the nonmoving party's case." *Dresher v. Burt*, 75 Ohio St.3d 280, 285 (1996); *see also Saxton v. Navistar, Inc.*, 10th Dist. Franklin No. 11AP-923, 2013-Ohio-352, ¶ 7.

{¶7} In *Dresher*, the Ohio Supreme Court held:

{¶8} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, and identifying those portions of the record before the trial court which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim. * * * [T]he moving party bears the initial burden of demonstrating that there are no genuine issues of material fact concerning an essential element of the opponent's case. To accomplish this, the movant must be able to point to evidentiary materials of the type listed in Civ.R. 56(C) that a court is to consider in rendering summary judgment. * * * The assertion must be backed by some evidence of

the type listed in Civ.R. 56(C) which affirmatively shows that the nonmoving party has no evidence to support that party's claims." *Dresher, supra*, at 292-293.

{¶9} In interpreting the United States Supreme Court decision in *Celotex v. Catrett*, 477 U.S. 317 (1986), the *Dresher* Court found no express or implied requirement in Civ.R. 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim. *Dresher, supra*, at 291-292. Furthermore, the *Dresher* Court stated that it is not necessary that the nonmoving party produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *Id.* at 289, quoting *Celotex, supra*. In sum, the *Dresher* Court held that the burden on the moving party may be discharged by "showing"–that is, pointing out to the Court–that there is an absence of evidence to support the nonmoving party's case. *Id.*

{¶10} "If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied." *Id.* at 293. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden as outlined in Civ.R. 56(E): "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party."

III. Evidence considered under Civ. R. 56(E)

Civ.R. 56(E) states:

> **Form of affidavits; Further testimony; Defense required**. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment

> is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

{¶11} Attached to UTMC's Motion for Summary Judgment are several exhibits and an affidavit from Ms. Lisa Simpson, a senior labor relations specialist at UTMC. In the affidavit, Ms. Simpson states that she has personal knowledge of the personnel records kept by UTMC, including Ms. Lemay's file, and the CBA between UTMC and Ms. Lemay's union. The exhibits attached to UTMC's Motion for Summary Judgment include the CBA; a contract extension agreement entered by UTMC and Ms. Lemay's union; the pre-disciplinary report and recommendation regarding Ms. Lemay; the letter placing Ms. Lemay on paid administrative leave; Ms. Lemay's termination letter; and the grievance Ms. Lemay filed pursuant to the CBA. Upon review, UTMC's exhibits are properly authenticated and the Court has reviewed them in formulating its decision.

{¶12} In response to UTMC's Motion for Summary Judgment, Plaintiffs filed a "Verified Memorandum in Opposition to the University of Toledo's Motion for Summary Judgment." Attached to the Memorandum is an affidavit from Ms. Lemay, which states:

{¶13} I, Melanie Lemay, being duly sworn according to law do state as follows:

> 1. I have read and reviewed the Complaint and Plaintiff's Verified Memorandum in Opposition to the University of Toledo's Motion for Summary Judgment and affirm their contents.
>
> 2. I hereby state that Defendant's termination reasons and statements are false.
>
> 3. One example of a false statement is that I saw the kidney being taken out of the room and did not do anything about it.

> 4. The Defendant claims that I did not log into the computer when I relieved Nurse Moore in the operating room. I strongly believe that I did log into the computer.
>
> 5. Some of the procedures that Defendant claims I violated were not in place until six days after the incident on August 10, 2012.
>
> 6. On August 10, 2012, there were no written policy in effect for anyone in the operating room to "watch" the removed kidney.
>
> 7. I strongly deny Defendant's statements that I failed to provide good behavior and efficient service and exhibited gross neglect of duties.
>
> 8. After my employment termination I filed a grievance and no action has been taken. The facts do not support my termination without redress.
>
> 9. Years have passed without any resolution of my loss of income, loss of retirement benefits and loss of health insurance, causing me to live in a state of hopelessness and depression.

{¶14} Initially, the Court notes that it is not aware of a civil rule or case law which allows a plaintiff to swear to the legal arguments submitted by her attorney and use that as a substitute for an affidavit. The Court believes that verification in this manner is improper because Ms. Lemay cannot personally swear to the legal arguments made by her counsel pursuant to Civ. R. 56(E).

{¶15} In support of their Memorandum in Opposition, Plaintiffs have filed several exhibits:

- Exhibit A: an unverified copy of Ms. Lemay's termination letter.
- Exhibit B: an unverified copy of Ms. Moore's corrective action/performance improvement form.
- Exhibit C: affidavits from Ignazio Messina and Jennifer Feehan, staff writers for the Toledo Blade, and four articles written by them about the incident that led to Ms. Lemay's termination.
- Exhibit D: an unverified copy of Ms. Lemay's grievance pursuant to the CBA.

- Exhibit E: an unverified copy of Ms. Lemay's diagnostic assessment by her counselor.

- Exhibit F: an unverified copy of Ms. Lemay's unemployment compensation appeal.

- Exhibit H: an unverified CD-ROM containing Ms. Lemay's testimony at her unemployment hearing.

{¶16} After reviewing these exhibits and Ms. Lemay's affidavit, the Court determines that only the Toledo Blade articles are properly authenticated pursuant to Civ.R. 56(E). However, in the interests of justice, the Court has considered all evidence submitted by Plaintiffs in formulating its decision.

IV. Wrongful discharge

{¶17} Pursuant to R.C. 2743.03(A)(1), the Court of Claims has exclusive, original jurisdiction over all civil actions against the state, unless otherwise provided by the legislature. The legislature enacted R.C. 4117.09, which gives exclusive jurisdiction to the courts of common pleas over actions alleging violations of a collective bargaining agreement. *Moore v. Youngstown State Univ.*, 63 Ohio App.3d 238 (1989). "As to the jurisdictional issue, R.C. 4117.10(A) provides that a collective bargaining agreement between a public employer and the bargaining unit 'govern the wages, hours, and terms and conditions of public employment covered by the agreement.' That section further provides that 'if the agreement provides for a final and binding arbitration of grievances, public employers, employees, and employee organizations are subject solely to that grievance procedure.' Therefore, R.C. 4117.10(A) clearly provides that the collective bargaining agreement controls all matters related to the terms and conditions of employment and, further, when the collective bargaining agreement provides for binding arbitration, R.C. 4117.10(A) recognizes that arbitration provides the exclusive remedy for violations of an employee's employment rights." *Gudin v. W. Reserve Psychiatric*

Hosp., 10th Dist. Franklin No. 00AP-912, 2001 Ohio App. LEXIS 2634 (June 14, 2001), citing *Oglesby v. City of Columbus*, 10th Dist. Franklin No. 00AP-544, 2001 Ohio App. LEXIS 438 (Feb. 8, 2001).

{¶18} Because Ms. Lemay's employment was governed by the CBA between her union, AFSCME 2415, and UTMC, Defendant states Plaintiffs' wrongful termination claim is baseless. In response, Plaintiffs point to Defendant's failure to follow the dispute resolution procedures outlined in the CBA. According to Plaintiffs, the lack of any real grievance procedures has rendered the CBA null and void. (Plaintiffs' Complaint, ¶ 5; Plaintiffs' Memorandum Contra, p. 13). Plaintiffs argue that this Court now has jurisdiction over their claims because the CBA expired in 2009. (Plaintiffs' Complaint, ¶ 5).

{¶19} Upon review, Defendant correctly notes that the Court has no jurisdiction to enforce the CBA and, as such, cannot interpret it. Plaintiffs acknowledge that Ms. Lemay's employment was originally governed by a contract of employment arising out of the CBA, though they also allege that the CBA expired prior to Ms. Lemay's termination. However, it appears that despite any allegations of the CBA's expiration, Ms. Lemay still received representation from her union. *See* Plaintiffs' Memorandum in Opposition, p. 7; Plaintiffs Memorandum in Opposition, Exh. D (noting the union's position that Ms. Lemay should be reinstated in her position and UTMC had not proven just cause terminating Ms. Lemay). As the Court previously held in case in Case No. 2013-00451, the parties must turn to the CBA to determine the applicability of its arbitration provision, and the required administrative procedures for Ms. Lemay's grievances. *See Lemay, et al. v. University of Toledo Medical Center,* Ct. of Claims No. 2013-00451 (Jan. 15, 2014). Accordingly, because there is no issue of material fact that Ms. Lemay's employment with UTMC is governed by the CBA, this Court does not have jurisdiction over Lemay's wrongful termination claim.

V. Defamation and loss of consortium

{¶20} "In Ohio, defamation occurs when a publication contains a false statement 'made with some degree of fault, reflecting injuriously on a person's reputation, or exposing a person to public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business or profession.'" *Jackson v. Columbus*, 117 Ohio St.3d 328, 331, 2008-Ohio-1041, ¶ 9, quoting *A & B-Abell Elevator Co., Inc. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 7 (1995). "To succeed on a defamation claim, a plaintiff must establish: (1) a false statement, (2) about the plaintiff, (3) published without privilege to a third party, (4) with fault of at least negligence on the part of the defendant, and (5) the statement was either defamatory per se or caused special harm to the plaintiff." *Watley v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 07AP-902, 2008-Ohio-3691, ¶ 26.

A. Falsity

{¶21} In addition to statements in Ms. Lemay's affidavit, Plaintiffs, through their Memorandum in Opposition, appear to allege that all testimony and the hearing officer's findings are false and defamatory. Similarly, Plaintiffs also appear to allege that all information given to the Toledo Blade by UTMC and the articles attached to its Memorandum in Opposition are false. Plaintiffs note that "comments on the discharge of an employee at the request of the media for public interest publications fall short of the strict requirements and scope of an absolute privilege." (Plaintiffs' Memorandum in Opposition, p. 14). However, Plaintiffs have failed to identify the specific statements and information presented at the hearing and to the Toledo Blade which were false. The Court does not believe that a claim for defamation with general allegations such as being made in this case is sufficient to state a claim. It is incumbent upon Plaintiffs to allege with some specificity those matters they believe were false and were disseminated to third parties, which proximately caused Ms. Lemay her damages.

{¶22} In her affidavit, Ms. Lemay only alleges three things as false:

- "One example of a false statement is that I saw the kidney being taken out of the room and did not do anything about it."
- "The Defendant claims that I did not log into the computer when I relieved Nurse Moore in the operating room. I strongly believe that I did log into the computer."
- "I strongly deny Defendant's statements that I failed to provide good behavior and efficient service and exhibited gross neglect of duties."

(Plaintiffs' Memorandum in Opposition, Affidavit of Melanie Lemay).

{¶23} With regard to each of these statements, Plaintiffs have failed to demonstrate to the Court who made this statement, when this statement was made, under what circumstances the statement was made, why these statements are false, and whether Ms. Lemay was proximately damaged due to this statement. Consequently, Plaintiffs have failed to prove the testimony provided in the hearing, the hearing officer's report, and the information provided to the Toledo Blade were false, thereby reflecting poorly on Ms. Lemay's reputation and affecting her adversely in her profession.

B. Privilege

{¶24} "As suggested by the definition, a publication of statements, even where they may be false and defamatory, does not rise to the level of actionable defamation unless the publication is also unprivileged. Thus, the threshold issue in such cases is whether the statements at issue were privileged or unprivileged publications." *Sullivan v. Ohio Dept. of Rehab. & Corr.*, Ct. of Cl. No. 2003-02161, 2005-Ohio-2122, ¶ 8. "[A] statement in a judicial or quasi-judicial proceeding is absolutely privileged and may not form the basis for a defamation action as long as the allegedly defamatory statement is

reasonably related to the proceedings. *Savoy v. Univ. of Akron*, 2014-Ohio-3043, 15 N.E.3d 430, ¶ 19 (10th Dist.).

{¶25} Defendant states that any testimony provided at Ms. Lemay's disciplinary hearing and the hearing officer's recommendation cannot be defamatory because the hearing was a quasi-judicial proceeding for which absolute privilege against defamation applies. Second, because Ms. Lemay's termination was a result of the hearing officer's recommendation, Defendant contends that the termination letter is also privileged. As noted above, it appears that Plaintiffs are arguing that all testimony presented at the hearing and the hearing officers'[2] report comprised of false statements that injured Ms. Lemay. For example, Plaintiffs state: "Nurse Lemay has always maintained that the reason she was fired as stated in the September 12, 2012 * * * letter supporting her termination are incorrect and false." (Plaintiffs' Memorandum in Opposition, p. 3). However, even if Plaintiffs had actually demonstrated that any statement made about Ms. Lemay was false, the Court cannot determine if the testimony presented during the hearing, the resulting hearing officer's report, and UTMC's termination letter are false. The hearing was a quasi-judicial proceeding because Ms. Lemay received a notice about the hearing, she was represented by the union, and she had the opportunity to present evidence during the hearing. *See, e.g. Savoy*, at ¶ 20, fn. 3. Consequently, from the evidence provided, the Court must conclude that any testimony provided by witnesses in that hearing, the hearing officers' report, and the termination letter, were all reasonably related to the hearing and are absolutely privileged.

C. Qualified Privilege

{¶26} Even if there is an absence of absolute privilege, a defendant is entitled to the defense of qualified privilege where "the interest that the defendant is seeking to

[2]Plaintiffs have not alleged that the hearing officer, who is not a party in this case, was a UTMC employee or otherwise under UTMC's control and therefore, UTMC is not responsible for the officer's statements.

vindicate is conditioned upon publication in a reasonable manner and for a proper purpose." *DeGarmo v. Worthington City Schools Bd. of Edn.*, 10th Dist. Franklin No. 12AP-961, 2013-Ohio-2518, ¶ 18. "The purpose of a qualified privilege is to protect speakers in circumstances where there is a need for full and unrestricted communication concerning a matter in which the parties have an interest or duty. * * * A qualified privilege exists when a statement is: made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or duty, if made to a person having a corresponding interest or duty on a privileged occasion and in a manner and under circumstances fairly warranted by the occasion and duty, right or interest * * *. Further, the essential elements of a communication protected by qualified privilege are: [1] good faith, [2] an interest to be upheld, [3] a statement limited in its scope to this purpose, [4] a proper occasion, and [5] publication made in a proper manner and to proper parties only.

{¶27} In reviewing Plaintiffs' Memorandum in Opposition, the Court finds that Plaintiffs have failed to meet their burden of pointing out specific statements reported to the news media, identifying UTMC agents who made those statements, and demonstrating the way in which they were false. Ms. Lemay's affidavit is silent about these matters and Plaintiffs simply allege that "[t]he totality of the articles as read are false and inflammatory towards Nurse Lemay." (Plaintiffs' Memorandum in Opposition, p. 6). However, the Court will analyze whether a qualified privilege exists for these statements.

{¶28} Plaintiffs rely on *Wrenn v. Ohio Dep't of Mental Health & Retardation*, 16 Ohio App.3d 160 (10th Dist.1984), to state that there is no privilege associated with the statements made by UTMC's agents to the media. In *Wrenn*, the Toledo Blade, printed articles quoting Department of Mental Health employees indicating the Toledo Mental Health Center's (TMHC) superintendent was terminated, in large part, because of a high ratio of overtime hours in comparison to other Department institutions. On appeal, the

Tenth District Court of Appeals held that a public interest was served by the release of information because the health center was a vital part of the mental health community and major operational developments were of considerable importance to the community. Employees who supplied a limited and reasonable amount of information on a matter of public concern enjoyed a qualified privilege. Additionally, the former TMHC superintendent failed to prove the presence of actual malice and the record contained evidence to support the accusations of high overtime use at the health center. *Id.* at 161, 163-64.

{¶29} Reviewing the evidence in a light most favorable to Plaintiffs, the articles attached to Plaintiffs' Memorandum in Opposition do not demonstrate that statements made by UTMC employees exceeded the scope of qualified privilege. The Court has reviewed the four Toledo Blade articles that were properly authenticated and attached to Plaintiffs' Memorandum in Opposition, all evidence submitted, and Ms. Lemay's affidavit, and has determined that there is no genuine issue of material fact that the information given to Toledo Blade by UTMC and its agents was made in good faith; was limited in scope to the investigation about the kidney disposal; and for the purpose of providing information to the public about a developing situation in the community, which was of compelling interest because a viable kidney was disposed as medical waste during a live donor procedure. For example, one article dated August 28, 2012 reports that the UTMC's live donor program was suspended and some employees, including Ms. Lemay, were put on paid leave pending the results of a multi-agency investigation. Another article dated August 31, 2012 provides an update on the investigation, noting that the UTMC surgical director of the renal transplantation department temporarily lost his title until the investigation was complete. Upon review, the Court finds that Plaintiffs have failed to identify any particular statements published by the Toledo Blade which are not covered under qualified privilege or were false.

D. Actual Malice

{¶30} "[I]f a defendant establishes all five elements for application of a qualified privilege, a plaintiff can defeat its application only by showing by clear and convincing evidence that the defendant acted with actual malice." (Internal citations omitted.) *Mallory v. Ohio University*, 10th Dist. Franklin No. 01AP-278, 2001-Ohio-8762, ¶ 21-22. "In a qualified privilege case, 'actual malice' is defined as acting with knowledge that the statements are false or acting with reckless disregard as to their truth or falsity." *Jacobs v. Frank*, 60 Ohio St.3d 111, 116 (1991).

{¶31} Defendant states that any statements given to the Toledo Blade by UTMC agents in the aftermath of the kidney disposal are a matter of public concern and Plaintiffs have failed to prove actual injury or malice stemming from those comments. In their Memorandum in Opposition, Plaintiffs baldly conclude that "Plaintiff has shown above actual malice on the part of defendant' [sic] speakers who had or should have had known of the falsity of their statements * * *." (Plaintiffs' Memorandum in Opposition, p. 14). Again, the Court notes that Plaintiffs have not identified any statements made by a UTMC agent who willfully disregarded the statements' falsity and presented it to the Toledo Blade with actual malice. Consequently, the Court finds that Plaintiffs have failed to demonstrate actual malice on UTMC's part.

E. Damages

{¶32} "Under Ohio common law, actionable defamation falls into one of two categories: defamation per se or defamation per quod." *Am. Chem. Soc. v. Leadscope, Inc.*, 10th Dist. Franklin No. 08AP-1026, 2010-Ohio-2725, ¶ 49. "In order to be actionable per se, the alleged defamatory statement must fit within one of four classes: (1) the words import a charge of an indictable offense involving moral turpitude or infamous punishment; (2) the words impute some offensive or contagious disease calculated to deprive a person of society; (3) the words tend to injure a person in his trade or occupation; and (4) in cases of libel only, the words tend to subject a person to public hatred, ridicule, or contempt." *Woods v. Capital Univ.*, 10th Dist. Franklin

No. 09AP-166, 2009-Ohio-5672, ¶ 28. "On the other hand, a statement is defamatory per quod if it can reasonably have two meanings, one innocent and one defamatory. Therefore, when the words of a statement are not themselves, or per se, defamatory, but they are susceptible to a defamatory meaning, then they are defamatory per quod. Whether an unambiguous statement constitutes defamation per se is a question of law." (Citations omitted.) *Woods* at ¶ 29. "When a statement is found to be defamation per se, both damages and actual malice are presumed to exist." *Knowles v. Ohio State Univ.*, 10th Dist. Franklin No. 02AP-527, 2002-Ohio-6962, ¶ 24. "When, however, a statement is only defamatory per quod, a plaintiff must plead and prove special damages." *Am. Chem. Soc.* at ¶ 51.

{¶33} The issue giving rise to Plaintiffs defamation claim is UTMC's allegation that Ms. Lemay did not follow operating room protocol during a live donor procedure. Statements related to this issue and provided to the media by UTMC do not constitute defamation per se. Alleging a person made a mistake in performing their job may amount to defamation but will not rise to the level of defamation per se. Consequently, any statements Plaintiffs' allege as defamatory are defamatory per quod, and Plaintiffs have the burden of proving special damages. In her affidavit, Ms. Lemay states that "[y]ears have passed without any resolution of my loss of income, loss of retirement benefits and loss of health insurance, causing me to live in a state of hopelessness and depression." (Plaintiffs' Memorandum in Opposition, Affidavit of Melanie Lemay). Upon review, the Court finds that Ms. Lemay is making a general statement about her current situation, which is a direct result of her termination. However, the statement does not demonstrate the special harm required under defamation per quod. For example, Plaintiffs have not explained how Ms. Lemay's termination from UTMC directly affected her ability to find another position. They simply state that she does not receive a call back after interviews. (Plaintiffs' Memorandum in Opposition, p. 3). Mere allegations such as these are insufficient to comprise special damages. Plaintiffs have also

provided a report from Ms. Lemay's counselor but again, there is no explanation as to how the report is evidence of Ms. Lemay's special damages.

{¶34} Therefore, viewing this matter in light most favorable to Plaintiffs, the Court finds that there are no issues of material fact with regard to the disciplinary hearing which was absolutely privileged; statements made by UTMC's agents to the media enjoy qualified privilege; and Plaintiffs have not demonstrated actual malice on part of UTMC or its agents. Plaintiffs cannot establish a prima facie case of defamation. Accordingly, Defendant's Motion for Summary Judgment shall be granted and judgment shall be rendered in favor of Defendant.

DALE A. CRAWFORD
Judge

[Cite as *Lemay v. Univ. of Toledo Med. Ctr.*, 2017-Ohio-7542.]

MELANIE LEMAY, et al. Plaintiffs v. UNIVERSITY OF TOLEDO MEDICAL CENTER Defendant	Case No. 2016-00860 Judge Dale A. Crawford JUDGMENT ENTRY

{¶35} A non-oral hearing was conducted in this case upon Defendant's motion for summary judgment. For the reasons set forth in the decision filed concurrently herewith, Defendant's motion for summary judgment is GRANTED and judgment is rendered in favor of Defendant. All previously scheduled events are VACATED. Court costs are assessed against Plaintiffs. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DALE A. CRAWFORD
Judge

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