IN THE CIRCUIT COURT FOR THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

Case No.

JOHN DOE NO. 1, M.D.; JOHN DOE NO. 2, D.O.; JOHN DOE NO. 3, M.D.; JOHN DOE NO. 4, M.D.; and JOHN DOE NO. 5, M.D.,

Plaintiffs,

vs.

CLEVELAND CLINIC FLORIDA (A NONPROFIT CORPORATION), a Florida not-for-profit corporation, and FREDERICK SCOTT ROSS, M.D.,

Defendants.
_____/

Count I/Whistleblower Violation by Cleveland Clinic Florida

Plaintiffs, John Doe No. 1, M.D.; John Doe No. 2, D.O.; John Doe No. 3, M.D., John Doe No. 4, M.D. and John Doe No. 5, M.D., sue Defendant, Cleveland Clinic Florida (A Nonprofit Corporation), a Florida not-for-profit corporation, and Frederick Scott Ross, M.D., and show:

Introduction

1. Drs. Doe Nos. 1-5, five of the hospital's eight Emergency Department physicians, bring this action under Florida's private-sector "Whistleblower Act" against Cleveland Clinic Florida ("CCF"), the

management of which constructively discharged them after they complained that the hospital's director of operations, Frederick Scott Ross, M.D., was jeopardizing patient safety through behaviors that violated both Florida's statutory prohibition against medical malpractice, i.e., "the failure to practice medicine in accordance with the level of care, skill, and treatment recognized in general law related to health care licensure," and the federal statute that requires recipients of Medicare funds to stabilize any patient who comes to its emergency room prior to discharging him or her and forbids "dumping" critical patients on other facilities. They also sue the director of operations, who retaliated against their whistle-blowing by seeking successfully to cause them to be replaced through an outside medical staffing company. They seek money damages, injunctive relief and attorney's fees and litigation expenses. They file this action as "John Does" in an attempt to avoid the professional shunning that often attaches to "whistleblowers" whose identities can be discovered through on-line searches; their identities are known to CCF.

Jurisdiction, Venue and Conditions Precedent

2. This is an action for damages in excess of $15,000, exclusive of costs and interest, and for equitable relief.

3. Venue is proper in Broward County because the cause of action accrued here and because the defendant does business here.

4. All conditions precedent to the bringing of this action have been satisfied, have been waived or would be futile.

Parties

5. John Doe No. 1, M.D.; John Doe No. 2, D.O.; John Doe No. 3, M.D., John Doe No. 4, M.D. and John Doe No. 5, M.D. ("the Emergency Department physicians") each was at all times material an "employee" as defined by § 448.101(2), Fla. Stat. and is protected under § 448.102(3), FLA. STAT. because he objected to, or refused to participate in, activities, policies, or practices that, in addition to endangering patient safety, were in violation of a law, rule or regulation.

6. Defendant, Cleveland Clinic Florida (A Nonprofit Corporation) ("CCF"), is a Florida not-for-profit corporation with its principal place of business in Weston, Florida. CCF at all times material was an "employer" as envisioned by § 448.101(3), FLA. STAT. (2015). It is also a recipient of Medicare, making it subject to the stabilization and anti-dumping provisions of the federal Emergency Medical Treatment & Labor Act ("EMTALA").

7. Frederick Scott Ross, M.D., has been, at all times material, CCF's director of operations for its Weston, Florida, hospital.

Laws, Rules and Regulations Violated

8. The Florida Legislature has defined "medical malpractice" as "the failure to practice medicine in accordance with the level of care, skill, and treatment recognized in general law related to health care licensure," §

456.50(1)(g), and, consistent with Article X, § 26, of the Florida Constitution, has made three or more incidents of such medical malpractice, when shown by clear and convincing evidence, a mandatory ground for the non-renewal or revocation of a physician's medical license. See § 456.50(1)(h) and § 456.50(2).

9. Congress in 1986 passed EMTALA to, among other things, create § 1867 of the Social Security Act, which is codified at 42 U.S.C. § 1395dd and provides in pertinent part that:

a. A hospital with an emergency room must provide medical screening to anyone who presents and requests medical treatment to determine whether that person has an "emergency medical condition," i.e.,

> a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in —
>
> (I) placing the health of the individual ... in serious jeopardy,
>
> (ii) serious impairment to bodily functions, or
>
> (iii) serious dysfunction of any bodily organ or part...

§ 1395dd(e)(1)(A).

b. If the patient has such a condition, the hospital must provide "such further medical examination and such treatment as may be required to stabilize the medical condition" within its capabilities to do so, or to transfer him to another facility that has such capabilities, consistent with a protocol spelled out in the statute, and

c. prior to any transfer, the hospital must obtain the patient's consent, certify that the benefits of transferring the patient outweigh the risk, minimize the health risk of a transfer, assure that the receiving facility is both able and willing to accept and treat the patient, forward all relevant medical records and ensure that appropriate transfer equipment and personnel are available.

General Allegations

10. Each of the Emergency Department ("ED") physicians is licensed pursuant to either Ch. 458, FLA. STAT. ("Medical Practice") or Ch. 459, FLA. STAT. ("Osteopathic Medicine").

11. Dr. Ross, who is also a physician licensed pursuant to Ch. 458, became director of operations in or about in mid-2015.

12. Dr. Doe No. 1, as the Chair of the ED, in September 2016 took to CCF's president, Wael Barsoum, M.D.; its chief of staff, Rodolfo Blandon, M.D.; Seth Podolsky, M.D., Vice Chair of Cleveland Clinic (Ohio) Emergency Services Institute, and Christopher Whinney, M.D., the chief of hospitalists for Cleveland Clinic (Ohio), dozens of incidents that he and other ED physicians on his staff had discovered in which they felt that Dr. Ross and his operational procedures had endangered patient safety.

13. The incidents include:

a. Dr. Ross instructed the nursing staff in August 2015 to permit to escape a patient whom an ED physician and a CCF psychiatrist

had Baker Acted because the patient was exhibiting signs of mental illness (but who was also suffering kidney failure, which can cause behavior mimicking psychosis) after two other hospitals had refused to accept him until after CCF completed his kidney dialysis. When sheriff's deputies took the "escaped" patient into custody in the lobby, Dr. Ross instructed them to take the patient to Broward General Medical Center and withheld any information about the patient's kidney failure — which incident Dr. Doe No. 1 also relayed to Lee Ghezzi, CCF's risk manager, and Barbara Del Castillo, CCF's general counsel.

b. Dr. Ross used CCF's computerized charting system to admit at 11:20 a.m. in February 2016, and then discharge a minute later — without any record of his ever having personally evaluated the patient — a patient whom an ED physician had admitted to Dr. Ross's care at 6 a.m. to be hospitalized and whose echocardiogram showed that the patient was in Class III heart failure.

c. Dr. Ross in January 2016 released, without any contemporaneous record of ever having personally evaluated him, a man admitted by an ED physician because of abdominal pain and an elevated white blood cell count — with a medical student's note, first appearing in medical record days ***after*** the patient was readmitted three days later in septic shock.

d. Dr. Ross discharged in May 2016, without any record of his ever having personally evaluated him, a chest-pain patient whom an ED physician admitted and who had a heart attack the following day, for which he received an angioplasty at Mt. Sinai Hospital in Miami Beach.

e. Dr. Ross electronically discharged to home in May 2016, without any record of his ever having personally evaluated her, a patient in kidney failure who was admitted by an ED physician and was deemed to be a fall risk by Physical Therapy, which recommended transfer to a skilled nursing facility.

f. Dr. Ross electronically discharged to home within six hours of arriving in August 2016 at the ED for fainting, without any record of his ever having personally evaluated her, a female cancer patient who tested as critically low for sodium and potassium and who developed chest pain while in the ED.

g. Dr. Ross engaged repeatedly in the behavior of discharging patients with no record of his ever having personally evaluated them, including twice on one day in September 2015, twice again on a day in May 2016 and once in June 2016.

h. Dr. Ross, who had not been consulted, engaged or otherwise asked to be involved in the care of a patient who was a heart transplant candidate in acute heart failure and who had been admitted to the hospital by his cardiologist, unilaterally in October 2016 cancelled

needed medications, tests, monitoring and other admission orders deemed necessary by the cardiologist.

14. Each of the incidents cited in ¶¶ 13(a)-(h) constituted "medical malpractice," as defined by 456.50(2)(g), FLA. STAT., i.e., "the failure to practice medicine in accordance with the level of care, skill, and treatment recognized in general law related to health care licensure....," which is grounds for discipline of both a medical doctor and an osteopathic physician under, respectively, § 458.331(1)(t) or § 459.015(1)(x).

15. The incident cited in ¶ 13(a) constituted a violation by Dr. Ross, and through him by CCF, of both the stabilization and the transfer provisions of EMTALA.

16. Although CCF management told Dr. Doe No. 1 in September 2016 that his concerns about Dr. Ross's policies and practices as director of operations has been "taken care of," Dr. Ross at that point began a counter-attack on the ED physicians: he began checking on the coming-and-going times of those physicians, who are the only physicians on the CCF payroll who are paid by the shift as opposed to through an annual salary.

17. When Dr. Doe No. 1 was recruited in 2007 to revamp CCF's ED, which had been staffed by an outside company, all of CCF's non-ED physicians were salaried employees — which is contrary to the way that most emergency-room physicians throughout the United States are paid, i.e., by the shift.

18. After Dr. Doe No. 1 explained that recruiting emergency-room physicians would be virtually impossible if they were not paid on a per-shift basis, CCF agreed to modify its salary model and to pay them per shift. As a result CCF ED physicians:

a. are (alone amongst the CCF-employed physicians) paid by the shift, based on whether it is a 10- or 12-hour shift;

b. get no additional pay for coming in early (an average of 30 minutes), staying late, coming in on days off, working at home to complete medical charts, doing medical research for publication, or teaching medical students and research fellows, and

c. get no paid vacation, sick leave or any other paid leave.

19. While the CCF ED physicians do not punch time clocks, they keep track of their shifts by writing down on a wall calendar each day that they come in that they are working either a 10- or a 12-hour shift, which is subsequently transferred to CCF's Kronos time-keeping program.

20. Consistent with a common practice amongst emergency-room practitioners across the nation — including in the 12 Cleveland Clinic hospitals throughout Ohio — if the patient load is down near the end of a shift, and if the next shift has already arrived, an ED physician will leave early with the consent of the remaining ED physician(s) on duty — a practice:

a. that CCF management has been aware of,

b. in which CCF management has acquiesced for the nine years that Dr. Doe No. 1 has been running the ED, and

c. that has not negatively impacted the ED's meeting its standard of ensuring that each patient will seen by a physician within an average of 12 minutes of his or her arrival.

21. Subsequent to Dr. Doe No. 1's carrying to management his and his ED colleagues' concerns about Dr. Ross's systemic violations of both Florida's ban on medical malpractice and the stabilization and transfer provisions of EMTALA, Dr. Doe No. 1 learned that Dr. Ross had began pulling records of when Dr. Doe No. 1 and his colleagues signed in and out of the CCF computer program that tracks medical charts and collecting security videotapes to document when they arrived and departed from the ED.

22. All of the eight ED physicians (other than one plaintiff physician who is out on medical leave because of knee surgery) were summoned February 1 to meet with local CCF management; Brad Borden, M.D., the chairman of the Emergency Services Institute from Cleveland Clinic in Ohio and Michael Michetti, Esquire, a labor-and-employment lawyer who is the executive director of Cleveland Clinic's Office of Professional Staff Affairs in Ohio, and asked about the practice, which each acknowledged had been in effect on a long-time basis.

23. Plaintiffs learned, from other physicians within the emergency-medicine community, that a medical staffing company, Staff Care, had begin recruiting physicians at least as early as January to work in CCF's ED on a "locum tenens," or part-time, basis at CCF, offering $220- to $375-an-hour (compared to the $214-an-hour that the ED physicians are currently paid), plus travel expenses — even though CCF management had told the plaintiffs that no decision had been made concerning their futures with CCF.

24. One of the ED physicians' sources reported that a Staff Care recruiter had told him that "the docs there are going to be told to turn in their badges and they don't even know it yet."

25. Covertly planning such an on-the-job ambush constitutes a constructive discharge, which relieves Drs. Doe Nos. 1-5 of the necessity to wait around for CCF to add insult to injury by humiliating them with on-the-spot terminations. They all, together with a sixth ED physician, therefore submitted their resignations Monday, February 6.

26. CCF's conduct in constructively discharging the five ED physicians subsequent to their opposing, and bringing to the attention of management, the violations of state and federal health-car law violated each doctor's rights under § 448.102(3), FLA. STAT.

27. As a direct, natural, proximate and foreseeable result of CCF's actions, Drs. Doe Nos. 1-5 has each has suffered past and future monetary

loss, emotional pain and suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.

28. Drs. Doe Nos. 1-5 each is entitled, pursuant to § 448.104, FLA. STAT., to recover his attorney's fees and litigation expenses.

Prayer for Relief

WHEREFORE, Drs. Doe Nos. 1-5 each prays that this court will:

One, enter judgment for Drs. Doe Nos. 1-5 each and against CCF for compensatory damages pursuant to § 448.101, et seq., FLA. STAT.;

Two, grant Drs. Doe Nos. 1-5 each such other and further relief as the circumstances and law require or provide, including but not limited to back wages and benefits, as well as prospective relief, including either reinstatement or front pay; and

Three, order CCF, to pay Drs. Doe Nos. 1-5 each his costs and reasonable attorney's fees pursuant to § 448.104, FLA. STAT.

Count II/Tortious Interference with Advantageous Business Relationship by Frederick Scott Ross, M.D.

29. Drs. Doe Nos. 1-5 adopt the allegations of ¶¶ 1-22.

30. Drs. Doe Nos. 1-5 each, through his employment, enjoyed an advantageous business relationship with CCF pursuant to an employment contract under which he had enforceable rights.

31. Dr. Ross was aware of Drs. Doe Nos. 1-5's business relationships with CCF.

32. Dr. Ross — who was outside of Drs. Doe Nos. 1-5's chain of command, who was motivated solely by a desire for revenge against those physicians for their having complained to CCF management about he behavior, who was not motivated by any desire to serve the interest of CCF and who had no honest belief that his actions would benefit CCF — knowingly interfered with Drs. Doe Nos. 1-5's advantageous business relationships with CCF by going to CCF and complaining about Drs. Doe Nos. 1-5's attendance.

33. As a direct, natural, proximate and foreseeable result of Dr. Ross's self-appointing himself to monitor the attendance of Drs. Doe Nos. 1-5 and complain about it to CCF management, Drs. Doe Nos. 1-5 each has suffered economic and non-economic damages, in the past and will continue to suffer such damages in the future.

34. The conduct of Dr. Ross was willful, wanton and evidenced such disregard for the rights of plaintiffs as to entitle Drs. Doe Nos. 1-5 to punitive damages and they reserves the right to amend to claim such damages upon the showing required by § 768.72, FLA. STAT.

WHEREFORE, plaintiffs, Drs. Doe Nos. 1-5 each prays that this court will grant judgment for him, and against Dr. Ross for damages, for the costs of this action, and for such other and further relief as is just.

Demand for Jury Trial

Plaintiffs demand trial by jury on all issues so triable.

/s/ William R. Amlong

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