

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA**

ALEXANDER A. STRATIENKO, M.D.)	
)	
Plaintiff,)	
)	
v.)	
)	Civil Action No. 1:07-CV-258
CHATTANOOGA-HAMILTON COUNTY)	
HOSPITAL AUTHORITY and MEL)	COLLIER/SHIRLEY
TWIEST, M.D., individually and in his)	
official capacity as Chief Medical Officer of)	
Chattanooga-Hamilton County Hospital)	
Authority, V. STEPHEN MONROE, JR.,)	
M.D., MITCHELL L. MUTTER, M.D.,)	
DANIEL F. FISHER, M.D., and NITA)	
SHUMAKER, M.D.)	
)	
Defendants.)	

MEMORANDUM OF LAW IN SUPPORT MOTION FOR SUMMARY JUDGMENT

Defendant Nita Shumaker, M.D. (“Dr. Shumaker”), by and through counsel and pursuant to Fed. R. Civ. P. 12(b)(6), respectfully submit this Memorandum of Law in support of her Motion for Summary Judgment (“Motion”) to dismiss the complaint of Plaintiff Alexander A. Stratienko, M.D. (“Plaintiff”).

UNDISPUTED FACTS

Dr. Shumaker is a pediatrician who served as Secretary of the Medical Staff and member of the Medical Executive Committee (“MEC”) during the events underlying this lawsuit. (Shumaker’s 12/1/04 Dep. pp. 10, 21 – copies of relevant pages attached to the Motion as Exhibit A.) Daniel F. Fisher, M.D. (“Dr. Fisher”) is a vascular surgeon who served as Chief of the Medical Staff during this time period. (Fisher’s 10/21/04 Dep. pp. 7, 25 – copies of the relevant pages attached to the Motion as Exhibit B.) Mitchell L. Mutter, M.D. (“Dr. Mutter”) is

a cardiologist who served as Vice Chief of the Medical Staff during this time period. (Mutter's 6/13/08 Dep. pp. 52, 253 – copies of the relevant pages attached to the Motion as Exhibit C.)

On September 16, 2004, Plaintiff, an interventional cardiologist on the medical staff of Chattanooga-Hamilton County Hospital Authority (“Erlanger”) and another interventional cardiologist on Erlanger’s staff, V. Stephen Monroe (“Monroe”), were involved in a physical altercation in Erlanger’s cath lab. (See Pl.’s Second Am. Compl. ¶ 19.) Although the exact details of the altercation is disputed, it is undisputed that Plaintiff used physical contact to move Monroe from the doorway of the cath lab. In fact, in a memorandum Plaintiff drafted immediately after the incident, Plaintiff admits that he cursed at Dr. Monroe and “pushed him out of the doorway.” (Plaintiff’s 10/27/04 Depo. Ex. 44 – copies of the relevant pages are attached to the Motion as Exhibit D.)

Very soon after the altercation, Dr. Mel Twiest (“Twiest”), Chief Medical Officer of Erlanger at that time, conducted an investigation of the matter. (Twiest’s 10/22/04 Depo. pp. 60-65, Ex. 27 – copies of the relevant pages and exhibits to the deposition are attached to the Motion as Exhibit E.) As part of his investigation, he interviewed a witness, Missy Fugatt; the cath lab director, Craig Cummings; and Dr. Monroe. (Id. pp. 152-62, 178, Ex. 27, 40.) Dr. Twiest also attempted to interview Plaintiff to get his version of what had occurred, but his attempts to contact Plaintiff were to no avail. (Id. pp. 179-80, 192-93.)

After these interviews, Twiest consulted Dr. Shumaker. (Shumaker’s 12/1/04 Depo. pp. 80-81.) After being informed of the details of the investigation, Dr. Shumaker stated her opinion that Plaintiff should be summarily suspended. (Twiest’s 10/22/04 Depo. pp. 182-83, Ex. 27; Shumaker’s 12/1/04 Depo. p. 94.) Twiest agreed with Dr. Shumaker assuming the investigation details remained consistent. (Twiest’s 10/22/04 Depo. pp. 179-80, Ex. 27.)

After consulting with Dr. Shumaker, Twiest notified Dr Fisher and then Dr. Mutter because they were the Chief of Staff and Vice Chief of Staff. (Twiest's 10/22/04 Depo pp. 175-77, Ex. 27; Fisher's 10/21/04 Depo. pp. 50-51; Mutter's 6/13/08 Depo. pp. 191-92.) Twiest told both Dr. Fisher and Dr. Mutter his call was for information purposes only and they all agreed that recusal by both Dr. Fisher and Dr. Mutter was appropriate.^{1 2 3} (Id.) While both Dr. Fisher and Dr. Mutter had basic knowledge of the incident, they did not offer their input, nor was it requested by Dr. Twiest, regarding how the situation should be addressed. (Id.)

The next day, which was September 17, 2004, Twiest was finally able to meet with Plaintiff. (Twiest's 10/22/04 Depo. p. 194, Exs. 41, 42.) Because Dr. Shumaker was unavailable, Twiest included Dr. Woods Blake, the Immediate Past Chief of Staff, in the meeting. (Shumaker's 12/1/04 Depo. pp. 151-54, 161; Twiest's 10/22/04 Depo. Ex. 41.) Twiest discussed the matter with Plaintiff and allowed Plaintiff the opportunity to explain his side of the altercation with Monroe. (Twiest's 10/22/04 Depo. pp. 181-82, Ex. 41.) Plaintiff, however, reported nothing that changed their findings from the investigation. (Id.) As a result, Twiest decided to go forward with suspending Plaintiff's medical staff privileges pending the results of an evaluation of Plaintiff by the TMF. (Id.) This suspension was documented in a letter dated September 16, 2004. (Id. Ex. 42.)

Instead of submitting to an evaluation at the TMF, however, Plaintiff filed a complaint against Erlanger and Twiest, individually and in his official capacity as Chief Medical Officer of Erlanger, on September 20, 2004, only four days after the incident. (See Pl.'s Complaint and

¹ Dr. Mutter is a cardiologist, so he is in economic competition with Plaintiff. (Mutter's 6/13/08 Depo. p. 300.) Dr. Fisher receives significant referrals from cardiologists including Plaintiff, and he had a personal relationship with Plaintiff. (Twiest's 10/22/04 Depo. p. 185; Fisher's 10/21/04 Depo. pp. 27, 56-57.)

² Also, Dr. Shumaker did not discuss the incident or the disciplinary action with Dr. Fisher or Dr. Mutter (other than very general status updates during subsequent MEC meetings). (Shumaker's 12/1/04 Depo. p. 172.)

³ On the day of the incident, Dr. Mutter briefly spoke to Dr. Monroe about the incident, and Dr. Mutter informed Dr. Monroe that he could have no involvement in the matter. (Mutter's 6/13/08 Depo. pp. 191-92.)

Am. Compl., copies of which are attached as Exhibit B and Exhibit C to Court Doc. No. 113.)

In 2005, Plaintiff applied for new privileges at Erlanger. (Mem. & Order 2, Court. Doc. No. 164.) Plaintiff was notified by a letter that his privileges were approved. (Id.) The same process occurred in 2007, although the notification letter Plaintiff received stated that the renewal was conditioned upon the resolution of the litigation. (Id.) Although the meaning of this approval has been disputed in this case, it is undisputed that Drs. Mutter and Fisher did not participate in any of the decisions as to how to handle Plaintiff's application for new privileges. (Mutter's 6/13/08 Depo. p. 144; Fisher's 6/11/08 Depo. pp. 64-65 - copies of relevant pages attached to the Motion as Exhibit F.)

On October 4, 2007, over three years after the suspension, Plaintiff filed a Second Amended Complaint that added Defendants Mutter, Fisher, and Shumaker as parties for the first time. (See Pl.'s Second Am. Compl. p.1.)

ARGUMENT

I. Standard of Review

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "The plain language of Rule 56(c) **mandates** the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322 (emphasis added). The principal purpose of summary judgment, therefore, is to dispose of claims that are not supported by the facts. Id. at 323-24.

II. Drs. Mutter and Fisher have adopted the arguments set forth in this Memorandum.

Because Drs. Mutter and Fisher have incorporated the arguments set forth in this Memorandum into their Memorandum in Support of their own Motion for Summary Judgment, this Memorandum shall refer to Drs. Mutter, Fisher, and Shumaker collectively as “Defendants.”⁴

III. Plaintiff’s breach of contract claim against all Defendants is misplaced and fails as a matter of law.

A. Defendants cannot be sued for breaching a contract to which they are not a party.

Plaintiff’s breach of contract claim against the individual Defendants is nonsensical. Specifically, Plaintiff has sued Defendants for allegedly breaching a contract when Defendants are not a party to any contract with Plaintiff. Plaintiff only alleges that “*Erlanger* grants Plaintiff certain contractual rights pursuant to the Medical Staff Bylaws.” (Pl.’s Second Am. Compl. ¶26 (emphasis added).) Plaintiff has not and cannot point to a contract to which Defendants are a party with Plaintiff. See, e.g., *Lewisburg Cmty. Hosp., Inc. v. Alfredson*, 805 S.W.2d 756, 759 (Tenn. 1991) (holding that the medical staff bylaws constitute a contract *between the hospital and the physician* and citing numerous cases in support). Moreover, there has been no consideration flowing between Defendants and Plaintiff. See, e.g., *Hughes v. Pullman*, 36 P.3d 339 (Mont. 2001) (holding that a hospital’s bylaws do not create a contract between the reviewed physician and the physician members of an ad hoc peer review committee as there is no consideration flowing between the physicians).

As a matter of very basic law, one must be a party to a contract in order to breach it. See, e.g., *Equal Employment Opportunity Comm’n v. Frank’s Nursery & Crafts, Inc.*, 177 F.3d 448, 460 (6th Cir. 1999) (“Under general principles of contract law, it is axiomatic that courts cannot

⁴ Additionally, as discussed above and more fully in Drs. Mutter’s and Fisher’s Memorandum, nothing in this Memorandum is intended to be an admission that Drs. Mutter and Fisher participated in the disciplinary process against Plaintiff. Rather, their participation is only assumed *arguendo* to show that dismissal is still proper nonetheless.

bind a non-party to a contract . . .”); Samuel H. Esterkyn, M.D., Inc. Pension Sharing and Profit Sharing Plan v. Van Hedge Fund Advisors, Inc., 108 F.Supp.2d 876, 894 (M.D. Tenn. 1999) (“A general rule of Tennessee contract law is that only the parties to a written agreement are bound by its terms.”) (citing V.L. Nicholson v. Trans. Inv. & Fin. Ltd., 595 S.W.2d 474, 482 (Tenn. 1980)). In other words, it is a factual and legal impossibility to breach a contract without being a party to it. Therefore, Plaintiff’s breach of contract claim should be dismissed against Defendants.

B. Defendants may not be held liable for any alleged breach of contract on the part of Erlanger.

To the extent Plaintiff establishes that he was in privity of contract with Erlanger, any alleged participation in the suspension on the part of Defendants would have been accomplished only through their official roles on the Erlanger Medical Executive Committee. In other words, Defendants were only acting as agents for their principal, Erlanger.⁵ Indeed, the *only* way Plaintiff’s privileges could be affected by Defendants’ actions would be through this capacity.

“Under Tennessee law, a known agent is bound by the contracts of his or her principal *only when ‘the circumstances show that the agent intended to be bound or assumed the obligations under the contract.’*” Menuskin v. Williams, 145 F.3d 755, 770 (6th Cir. 1998) (citing Holt v. Am. Progressive Life Ins. Co., 731 S.W.2d 923, 925 (Tenn. Ct. App. 1987) (emphasis added). In the instant case, Plaintiff can point to absolutely no evidence that Defendants “intended to be bound” by an alleged contract between Erlanger and Plaintiff. See, e.g., Talwar v. Catholic Healthcare Partners, 285 Fed. Appx. 800, 803-05 (6th Cir. 2007) (holding that there was no contract between the physician and the defendant members of the

⁵ The agency of Defendants is discussed in more detail later. In any event, their agency is not in dispute. (See Pl. Second Am. Comp. ¶33 (referring to all of the defendants in this case as “a public entity and agents for a public entity”).)

Medical Executive Committee because there was no intent to be bound). As a result, there is no genuine issue as to any material fact related to this breach of contract claim such that it must be dismissed.

IV. Plaintiff's antitrust claims fail for numerous reasons.

A. Tennessee antitrust laws only apply to tangible goods, which are not involved in this case.

Plaintiff alleges that Defendants violated Tennessee's antitrust laws by summarily suspending him. (Second Am. Compl. ¶30.) However, Tennessee courts have consistently held that the law in Tennessee "is well settled that the [Tennessee Trade Practices Act ("TTPA")] applies only to tangible goods, not intangible services." Bennett v. Visa U.S.A. Inc., 198 S.W.3d 747, 751 (Tenn. Ct. App. 2006) (citing McAdoo Contractors, Inc. v. Harris, 439 S.W.2d 594 (1969)); see also Baird Tree Co. v. City of Oak Ridge, No. E2007-01933-COA-R3-CV, 2008 WL 2510581 at *6 (Tenn. Ct. App. June 24, 2008) ("The law is well settled that the TTPA applies only to tangible goods, not intangible services.") (citing McAdoo).⁶

Plaintiff is a cardiologist who provides health related services to his patients. He does not manufacture or sell "articles" or "products" as is required in Tenn. Code Ann. § 47-25-101. Because the TTPA does not apply to intangible services as is involved in this case, Plaintiff's state antitrust claim should be denied.

B. Plaintiff's antitrust claims should be dismissed where Plaintiff has failed to show any legally cognizable antitrust injury and has failed to define the relevant market.

Plaintiff has failed to set forth valid antitrust claims. "To establish an antitrust violation,

⁶ Specifically, the TTPA states the following: "All arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this state, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article, are declared to be against public policy, unlawful, and void." Tenn. Code Ann. § 47-25-101 (emphasis added).

a plaintiff must show a contract, combination, or conspiracy that affects interstate commerce and unreasonably restrains trade.” Lie v. St. Joseph Hosp. of Mount Clemens, 964 F.2d 567, 568 (6th Cir. 1992) (citation omitted). The Sixth Circuit has noted that

The Supreme Court has set out two kinds of analysis to examine whether agreements run afoul of antitrust laws: the first employs a presumption that an agreement is an antitrust violation, thus invoking a *per se* illegality rule to classify the agreement; the second, called ‘rule of reason’ analysis, ‘requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.’

Id. at 569 (citing Arizona v. Maricopa County Med. Soc’y, 457 U.S. 332 (1982)).

The instant case does not involve a *per se* restraint on trade. “*Per se* violations involve ‘agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.’” Id. (citing Nat’l Soc’y of Prof’l Engineers v. United States, 435 U.S. 679, 692 (1978)). Examples of *per se* illegal restraints on trade are boycotts and price fixing. Id. (citing FTC v. Superior Court Trial Lawyers Ass’n, 493 U.S. 411, 432-36 (1990)). Plaintiff has presented no proof whatsoever demonstrating *any* anticompetitive activity, much less activity that would be considered “so plainly anticompetitive” so as to constitute a *per se* violation. As a result, a *per se* application is not warranted.

Therefore, Plaintiff must employ a “rule of reason” analysis to be successful in his antitrust claims. Under that analysis, “it is necessary to ‘evaluate [the agreement] by analyzing the facts peculiar to the business, the history of the restraint, and the reasons it was imposed . . . to form a judgment about the competitive significance of the restraint.’” Id. (citing Nat’l Soc’y of Prof’l Engineers, 435 U.S. at 692). In this case, Plaintiff has not produced any evidence whatsoever to provide the Court with this analysis. Some of the facets of this analysis are discussed below.

1. *Plaintiff has failed to define the relevant market.*

Plaintiff has not defined the relevant market for his antitrust claims. An antitrust plaintiff must define the relevant market in order to state a claim under the antitrust statutes. Cupp v. Alberto-Culver USA, Inc., 310 F.Supp.2d 963, 969 (W.D. Tenn. 2004) (citing Stratmore v. Goodbody, 866 F.2d 189, 194 (6th Cir. 1989)). Defining the relevant market is the “starting point in a rule of reason case.” Stratmore, 866 F.2d at 194 (citation omitted). “The relevant market is used to gauge market power, which in turn indicates the potential anticompetitive effect of a challenged restraint.” Id. Furthermore, a plaintiff’s failure to identify the relevant market is proper grounds for the dismissal of antitrust claims. Spahr v. Leegin Creative Leather Prods., Inc., No. 2:07-CV-187, 2008 WL 3914461 at *9 (E.D. Tenn. Aug. 20, 2008) (citing Nat’l Hockey League Players Ass’n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 719-20 (6th Cir. 2003)).

In Nilavar v. Mercy Health Sys.-Western Ohio, No. 06-3819, 2007 WL 2264439 at *1, *1 (6th Cir. Aug. 7, 2007), the plaintiff was a physician who asserted antitrust claims based on the termination of his clinical privileges and various other allegations. The trial court granted the defendants’ motion for summary judgment as to the plaintiff’s antitrust claims in part because of the plaintiff’s “failure to have expert testimony on the geographic market.” Id. at *2. On appeal, the Sixth Circuit noted the proof that Plaintiff offered in defining the relevant market:

Plaintiff offered the following definition of the relevant geographic market: ‘the physician component of diagnostic radiology services provided in [a] ... hospital setting’ with a relevant submarket consisting of ‘the physician component of diagnostic radiology services provided to inpatients.’ As to the locale, plaintiff defined it as ‘essentially comprising Clark and Champaign Counties,’ consisting of an area encompassed by nineteen ZIP codes.

Id. at *5.

The plaintiff in that case submitted expert testimony to establish the market. The Sixth Circuit reviewed the expert testimony on this issue and held that, despite the expert’s extensive

analysis of the alleged defined market, the expert's tests were "flawed to the point of unreliability." Id. at *8. As a result, the Sixth Circuit agreed that the expert's testimony was inadmissible and upheld the defendant's motion for summary judgment on the basis that the plaintiff had failed to define the relevant market. Id. at *2-3, 8.

In the instant case, Plaintiff does not even begin to identify the relevant market. No proof, much less expert proof, has been provided that even remotely resembles the extensive analysis provided in Nilavar, and the Sixth Circuit did not even accept the analysis in that case. As a result, this blatant failure to define the relevant market constitutes an independent reason for dismissal of Plaintiff's antitrust claims.

2. *Plaintiff has not suffered an antitrust injury.*

Even assuming a relevant market has been defined, Plaintiff has failed to establish that he has suffered the type of injury that antitrust laws were designed to prevent. Specifically, he has presented no proof that any of Defendants' actions have harmed the relevant market, but rather has only alleged that he has been harmed individually.⁷ "[T]he Sixth Circuit has confirmed that harm to the market is the essential inquiry [into the application of the rule-of-reason test], not harm to the particular individual competitor." Calabrese v. St. Mary's of Mich., No. 06-13908-BC, 2007 WL 518912 at *2 (E.D. Mich. Feb. 15, 2007) (citing Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc., 347 F.2d 241, 245 (6th Cir. 1982)).

In other words, "[p]laintiffs must prove antitrust injury, which is to say that they have suffered an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." United States v. Solinger, 457 F.Supp.2d 743, 759 (W.D. Ky. 2006) (citing Valley Prods. Co. v. Landmark, A Div. of Hospitality Franchise Sys.,

⁷ Although it is not relevant to the analysis here, Defendants contest that Plaintiff has produced *any* proof of harm whatsoever that resulted from the suspension of his privileges.

Inc., 128 F.3d 398, 402 (6th Cir. 1997)). “The reason for this heightened standard is that the relevant antitrust laws were enacted for ‘the protection of competition not competitors.’” Id. (citing Brunswick, 429 U.S. at 488 (quoting Brown Shoe Co., 370 U.S. at 294)). “An injury to an economic actor does not necessarily mean there has been an injury to the market.”⁸ Id.

Solinger had facts that are notably similar to the instant case. In Solinger, the plaintiff was a pediatric cardiologist whose privileges to practice at the state’s only full-service pediatric hospital were terminated. Id. at 747, 749. His myriad of claims against the defendants included numerous antitrust claims for the suspension of his privileges and several other acts, including an alleged manipulation of the on-call rotation schedule, that he claimed constituted a concerted attempt to remove him as a competitor from the marketplace.⁹ Id. at 758-61.

The court, however, stated that “[t]he peer review action cannot support an antitrust claim,” and granted the defendants’ motion for summary judgment as to those claims. Id. at 760-62. The court’s reasoning was that injury to the plaintiff alone, without a showing that there was an injury to the market, is insufficient to sustain an antitrust action. Id. at 760. As the court stated,

Plaintiff has failed to show any legally cognizable antitrust injury. Plaintiff has alleged no facts that tend to show that Defendants [sic] actions actually harmed the market for pediatric cardiac services by increasing price or reducing the quality of service. ... **Even if not protected by [Healthcare Quality Improvement Act] immunity, a decision by a hospital to terminate a single doctor’s privileges simply does not result in the type of injury to competition that the antitrust laws were designed to prevent.** The Sixth Circuit has been reasonably aggressive in using the antitrust injury doctrine to bar recovery where the asserted injury, although linked to an alleged violation of antitrust laws, flows directly from conduct that is not itself an antitrust violation. ... Nor does the

⁸ The presence of antitrust injury is also a prerequisite for a claim for a violation of Tennessee antitrust laws. See, e.g., Roberson v. Medtronic, Inc., 494 F.Supp.2d 864, 870 (W.D. Tenn. 2007) (stating that the plaintiff must establish antitrust injury on all of his antitrust claims where the plaintiff had asserted antitrust violations under Tennessee law).

⁹ The plaintiff in Solinger contended that “the peer review action was only the final move by Defendants in a string of actions designed to eliminate him from the pediatric cardiology market.” Solinger, 457 F.Supp.2d at 760.

alleged manipulation of the on-call rotation amount to an antitrust injury. Failure to obtain a favorable on-call rotation can be very damaging to a given physician's practice, but it is not an antitrust injury. A shift in patients from one competitor to another simply does not reduce output, or establish harm to market wide competition. ... **[The plaintiff's] vague and conclusory allegations of antitrust law violations fail to identify any legally cognizable antitrust injury.**

Id. at 760-61 (emphasis added). See also Lie, 964 F.2d at 570 (“[The physician] can show only that he has suffered economic injury, a loss of personal income. He shows no evidence to suggest an injury to competition in the form of increased cost or reduced supply of services or harm to the customer. He produces nothing that suggests an illegal restraint of trade. In the absence of such a showing, [the physician] has no antitrust complaint.”).

As a result, this lack of antitrust injury provides an independent reason to dismiss Plaintiff's antitrust claims.

C. The intracorporate conspiracy doctrine bars Plaintiff's antitrust claims.

Plaintiff has failed to demonstrate that there has been a “contract, combination, or conspiracy,” which is required for him to be successful on his antitrust claim. See Nurse Midwifery Assocs. v. Hibbett, 918 F.2d 605, 611 (6th Cir. 1990) (“It is crucial that there has been a contract, combination, or conspiracy between separate entities, because section 1 [of the Sherman Act] does not reach unilateral conduct even if such conduct unreasonably restrains trade.”) (citing Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984)). Specifically, an entity cannot conspire with its agents or employees. Id. (citing Smith v. N. Mich. Hosps., 703 F.2d 942, 950 (6th Cir. 1983)). This requirement is called the “intracorporate conspiracy doctrine,” and exists because “officers of the same firm are not separate economic actors pursuing separate economic interests.” Id. (citations omitted).

In Nurse Midwifery, the plaintiffs sued several hospitals and certain members of those hospitals' medical staffs under the theory that the defendants were involved in multiple antitrust

conspiracies and were preventing the plaintiffs from obtaining hospital privileges to further their own medical practices. Nurse Midwifery, 918 F.2d at 607-08, 611-12. **The Sixth Circuit, however, held that the intracorporate conspiracy doctrine prevents a finding of conspiracy between a hospital and its medical staff**, and dismissed the claims of conspiracy between the hospitals and their own medical staffs. See, e.g., id. at 614.

On the other hand, the Sixth Circuit did recognize that the doctrine “does not preclude a conspiracy among individual members of the medical staff.” Id. at 614. However, the court explained the applicability of this concept: “When the staff as a group makes decisions or recommendations for the hospital in areas that do not affect the market in which they compete as individuals, there is no reason not to treat them as agents of the hospital.” Id.

In applying this concept, the Sixth Circuit evaluated whether the doctrine applied as to the plaintiff’s allegations that a conspiracy existed among the individual members of the medical staff.¹⁰ Id. at 614-15. Central to this determination was the fact that the plaintiffs competed against obstetricians. Id. at 614. Specifically, because one of the defendants was a pediatrician and did not compete against obstetricians, the intracorporate conspiracy doctrine barred an antitrust conspiracy claim against that defendant. Id. at 614. However, because the other defendants were competing obstetricians, the doctrine did not apply to them.¹¹ Id. at 614-15.

In the instant case, the intracorporate immunity doctrine bars an antitrust conspiracy claim between Erlanger and Drs. Mutter, Fisher, and Shumaker, as Nurse Midwifery leaves no question that a hospital cannot conspire with its own medical staff. Additionally, the doctrine

¹⁰ Note that the Sixth Circuit also discussed and rejected the application of an exception to the intracorporate immunity doctrine that some federal circuits have applied that is called the “Independent Personal Stake Exception.” Nurse Midwifery, 918 F.2d at 615. In fact, the Sixth Circuit has repeatedly rejected this exception for approximately 25 years. See Alba, 184 F.R.D. at 286-89 (discussing the history of the Sixth Circuit’s application of the intracorporate immunity doctrine to physicians and hospitals).

¹¹ The analysis discussed here only applies to one of the hospitals involved in this case and its related physicians. Although this case involved more entities and physicians, they are not discussed here for purposes of brevity.

bars an antitrust conspiracy claim among Drs. Mutter, Fisher, and Shumaker or any other individual defendant, as none of these Defendants made any privilege decisions that “affect[ed] the market in which they compete as individuals.” Id. Specifically, as discussed previously, the only defendant physicians to make the decision to summarily suspend Plaintiff were Drs. Twiest and Shumaker, who do not practice in the same field as Plaintiff and are therefore not in direct competition with him. In other words, the MEC took responsible steps to avoid a conflict of interest, real or apparent, that might have arisen as a result of a competing physician participating in the decision to suspend Plaintiff.

Moreover, Drs. Mutter, Fisher, and Shumaker have a more affirmative agency relationship with Erlanger than what is described in Nurse Midwifery. Specifically, the Sixth Circuit conducted its analysis of the intracorporate immunity doctrine based on the fact that “members of a medical staff are not salaried employees of the hospital but are independent medical practitioners.” Id. at 614. However, Drs. Mutter, Fisher, and Shumaker are not mere members of the medical staff of Erlanger, but rather were the elected medical staff officers. By virtue of these positions they received a small monetary stipend and served on the hospital’s Medical Executive Committee. The elected medical staff officers’ affirmative duty is to take action on behalf of their hospital and make these types of decisions (assuming no conflict of interest exists) As a medical staff officer, Dr. Shumaker was the instrument by which the entity of Erlanger took action against Plaintiff, and did not merely make a recommendation for Erlanger to do so. In other words, their agency relationship with Erlanger is more direct than what is described in Nurse Midwifery such that the intracorporate immunity doctrine’s application is even more warranted. As a result, the intracorporate conspiracy doctrine bars any antitrust claims against Drs. Mutter, Fisher, and Shumaker.

- D. Drs. Mutter, Fisher, and Shumaker are provided immunity from antitrust claims under the Local Government Antitrust Act and the State Action Immunity doctrine.

Erlanger is a governmental entity.¹² See, e.g., Ketron v. Chattanooga-Hamilton County Hosp. Authority, 919 F.Supp. 280, 282-84 (E.D. Tenn. 1996) (reviewing Tennessee statutory and case law pertaining to Erlanger and stating that “the cases broadly stand for the proposition that the Hospital Authority . . . is a governmental entity and a subdivision of the state”). As a result, Drs. Mutter, Fisher, and Shumaker are agents of a governmental entity and enjoy certain immunities.

1. Local Government Antitrust Act.

The Local Government Antitrust Act (“LGAA”) is codified at 15 U.S.C. §§ 34-36, and it “establish[es] as a general rule that antitrust damages are not recoverable from any local government.” Opdyke Inv. Co. v. City of Detroit, 883 F.2d 1265, 1266 (6th Cir. 1989). This includes agents of local governments. 15 U.S.C. §§ 35, 36.¹³

The LGAA applies to members of a hospital’s medical staff when the hospital constitutes a governmental entity. See, e.g., Scara v. Bardley Mem’l Hosp., No. CIV-1-91-28, 1993 WL 404150 at *2 (E.D. Tenn. Feb. 4, 1993); Cohn v. Bond, 953 F.2d 154, 157-58 (4th Cir. 1991). In Cohn, the plaintiff sued a hospital and members of the hospital’s medical staff when his application for privileges was denied. Id. at 156-57. Because the hospital was a local governmental unit, however, the court held that none of the defendants, including the individual

¹² Once again, this fact is not in dispute. (See Pl.’s Second Am. Compl. ¶33 (referring to all of the defendants in this case as “a public entity and agents for a public entity”).)

¹³ Specifically, 15 U.S.C. § 35(a) states: “No damages, interest on damages, costs, or attorney’s fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity.” Similarly, 15 U.S.C. § 36(a) states: “No damages, interest on damages, costs or attorney’s fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) in any claim against a person based on any official action directed by a local government, or official or employee acting in an official capacity.”

physicians, were liable for antitrust violations due to the protections provided by the LGAA. Id. at 157-58. Specific to the individual defendants, the court stated as follows:

Physicians who make peer review decisions at the behest of, or by delegation from, the hospital's board of trustees, are acting as agents of the hospital and are, therefore, indistinguishable from the hospital. ... Therefore, their actions in this respect are entitled to immunity from money damages under the LGAA because of their unitary status with [the hospital].

Id. at 158. See also Scara, 1993 WL 404150 at *1-2 (holding that the individual defendant physicians had immunity from antitrust suits when they acted in their official duties on behalf of the hospital, which was a Tennessee hospital covered by the LGAA).

In the instant case, any action taken by Defendants in suspending Plaintiff were taken in their "official capacities" of Erlanger, a local governmental entity. Indeed, no defendant would have been able to suspend Plaintiff without this official capacity. As a result, the LGAA provides Defendants with immunity from monetary damages as to any antitrust claim set forth by Plaintiff.

2. *Plaintiff's antitrust claims are barred by state action immunity.*

Defendants' relationship with Erlanger provides them with the protections of the state action immunity doctrine. This doctrine was originally set forth in Parker v. Brown, 317 U.S. 341 (1943). Recently, the Sixth Circuit explained the underpinnings of the Parker state action doctrine:

Under the so-called "state action doctrine," it is well established that antitrust law does not apply to states acting as sovereigns. The Supreme Court has determined that principles of federalism and state sovereignty provide blanket protection for states, but political subdivisions of the states are not automatically immune from antitrust liability. Political subdivisions of states are beyond the reach of the antitrust laws only when they act pursuant to a "clearly expressed state policy."

Jackson, Tenn. Hosp. Co., LLC v. W. Tenn. Healthcare, Inc., 414 F.3d 608, 611-12 (6th Cir. 2005) (citations and footnotes omitted).

In the instant case, it is well settled that Erlanger is a political subdivision of the state. See, e.g., Ketron v. Chattanooga-Hamilton County Hosp. Auth., 919 F.Supp. 280, 284 (E.D. Tenn. 1996) (Collier, J.); Fitten v. Chattanooga-Hamilton County Hosp. Auth., No. 1:01-CV-152, 2002 WL 32059748, 1 (E.D. Tenn. Oct. 21, 2002) (Edgar, J.). Additionally, it is clear that Erlanger has a “clearly expressed state policy” by which it has the authority to act in a manner such that it is protected by the state action immunity doctrine. Hallie, 471 U.S. at 40. Specifically, in 1996 the Tennessee General Assembly adopted the Private Act Hospital Authority Act, Tenn. Code Ann. § 7-57-601, *et seq.*, to extend the powers of the metropolitan hospital authorities to the private act hospitals such as the Authority. This Act expressly extends authorization to Erlanger to appoint officers and hire employees, Tenn. Code Ann. § 7-57-301(9), **and regulate the hospital privileges of physicians**, Tenn. Code Ann. § 7-57-301(16) (emphasis added).

Moreover, the State of Tennessee grants this authorization “*regardless of the competitive consequences thereof.*” Tenn. Code Ann. § 7-57-502(c) (emphasis added). In interpreting this very provision, the Sixth Circuit concluded that

the legislative language and surrounding circumstances . . . demonstrate[s] that the Tennessee legislature invested public hospital corporations with very broad powers to ensure their continued viability; authorized them to exercise many powers, such as contracting for services and acquiring property, that could easily lead to anti-competitive consequences; and then specifically stated that such activities could be undertaken without regard to the effects of such activity on competition. **This constitutes the authorization necessary to invoke the state action doctrine.**

Jackson, 414 F.3d at 614 (emphasis added).

Therefore, the protection from federal antitrust laws enjoyed by the State of Tennessee extends to Erlanger. Because Defendants each held positions on Erlanger’s Medical Executive Committee at the time of the suspension, and were regulating the privileges of a physician as

clearly enumerated under Tennessee law, they are state officials such that this immunity extends to them. In other words, the State of Tennessee has explicitly authorized Defendants' actions.

Even if the Court finds that Defendants were not "state officials" of Erlanger for purposes of the state action doctrine, the doctrine would still apply to Defendants as private actors pursuant to California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980). According to the Court in Midcal, even a private actor may be extended the protection of the state action doctrine if, in addition to a showing of a clearly expressed state policy required of state subdivisions, he shows that he was actively supervised by a state official. Id.; see also Patrick v. Burget, 486 U.S. 94, 105 (1988) ("The active supervision prong of the Midcal test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."). Undoubtedly, Twiest was a state official at the time of the suspension because, as discussed earlier, he was the Chief Medical Officer and Senior Vice President of Medical Affairs of Erlanger. Because he controlled the process and decision surrounding Plaintiff's suspension, Defendants were adequately "supervised" such that their actions are covered by the doctrine.

In other words, Defendants "hold the trump in this case" regarding the state action doctrine. Jackson, 414 F.3d at 612. Accordingly, Plaintiffs' federal antitrust claims do not lie against Defendants and summary judgment should be entered in their favor as to any such claims.

V. Plaintiff's conspiracy claim is entirely unsubstantiated, and fails as a matter of law because it is a predicate tort and because it is barred by the intracorporate conspiracy doctrine.

A. No viable predicate tort exists in this case to support Plaintiff's claim of conspiracy.

As discussed more fully in Defendants' briefings related to their Motion to Dismiss

(Court Doc. No. 113), civil conspiracy is not independently actionable, but rather requires an underlying predicate tort committed pursuant to the conspiracy. (See Defs.’ Reply to Pl.’s Resp. to Mot. to Dismiss 12-13, Court Doc. No. 217 (citing Watson’s Carpet & Floor Coverings, Inc. v. McCormick, 247 S.W.3d 169, 186 (Tenn. Ct. App. 2007) (citations omitted); Freeman Mgmt. Corp. v. Shugard Storage Ctrs., LLC, 461 F.Supp.2d 629, 643 (M.D. Tenn. 2006)).)

Defendants respectfully submit that, after the Court has reviewed the arguments set forth in this brief and the statute of limitations arguments set forth in their Motion to Dismiss, if the Court dismisses all of Plaintiff’s claims except for the conspiracy claim, there will be no predicate tort upon which Plaintiff can base the claim. As a result, the conspiracy claim should be dismissed.

B. The intracorporate immunity doctrine applies to conspiracy torts.

As explained extensively above in the antitrust section, Defendants are protected by the intracorporate immunity doctrine. This doctrine also applies to conspiracy torts. See, e.g., Trau-Med of Am., Inc. v. Allstate Ins. Co., 71 S.W.3d 691, 703 (Tenn. 2002). As explained in Trau-Med, “wholly intracorporate conduct does not satisfy the plurality requirement necessary to establish an actionable conspiracy claim.” Id. Therefore, as set forth above, the application of the intracorporate conspiracy doctrine also bars Plaintiff’s conspiracy tort claims.

VI. The unity of interest privilege bars Plaintiff’s claims of business torts, and Plaintiff has failed to produce any evidence to satisfy those claims.

A. These claims are barred by the unity of interest privilege.

Plaintiff asserts several tort-based claims which stem from the allegation that Defendants somehow interfered with the business relationship between Plaintiff and Erlanger and, by extension, between Plaintiff and his patients. Similar to the previous discussions on agency, however, Tennessee law does not recognize any such causes of action against Defendants as a

result of their capacity with Erlanger. See, e.g., Forrester v. Stockstill, 869 S.W.2d 328 (Tenn. 1994); Waste Conversion Sys., Inc. v. Greenstone Indus., Inc., 33 S.W.3d 779, 782 (Tenn. 2000).

As the Tennessee Supreme Court explained,

Since a corporation can act only upon the advice of its officers and agents and since important societal interests are served by corporations receiving candid advice from these persons, . . . officers, directors, and employees [are] immune from claims of intentional interference with employment if they act within the general range of their authority and their actions were substantially motivated by an intent to further the interest of the corporation.

Waste Conversion Sys., Inc., 33 S.W.3d at 782 (citing Forrester, 869 S.W.2d at 334-35).

In the instant case, Defendants cannot be liable for interfering with Plaintiff's business relationships with either the Authority or his patients because they acted within the "general range" of their authority and their actions were "substantially motivated by an intent to further the interest of' the Authority. *Id.*

The proof adduced in this case demonstrates that in the summary suspension of Plaintiff, Dr. Twiest and Dr. Shumaker acted within the general range of their authority as Chief Medical Officer and Secretary of the Medical Staff. Assuming, *for the sake of argument only*, that Plaintiff could show that Dr. Twiest and Dr. Shumaker erred in his application of the bylaws or exercised poor judgment, Plaintiff still cannot show that Dr. Twiest and Dr. Shumaker acted outside the *general* range of their authority in respect to the summary suspension of Plaintiff. See McConnell v. Jones, 228 S.W.2d 117, 122 (Tenn. Ct. App.1949) (holding that an employee may act in the course of his employment even in disobedience of the employers' specific instructions).

Moreover, the proof shows that the reason for the suspension was primarily to prevent the disruption of hospital operations. (Twiest Depo. 199-200.) Dr. Twiest also that felt an evaluation of Plaintiff was needed to determine whether there might be a risk to the health or

safety of an employee. (Id.) Plaintiff may disagree as to whether such a suspension was necessary or warranted as a result of Plaintiff's conduct, but there is no credible evidence in this matter to suggest that the suspension was substantially motivated by anything other than an intent to further the interest of the Authority.

Further, any causes of action based on Defendants' alleged interference with Plaintiff's current or prospective patients fail independently of the rule set forth in Forrester. To succeed in his claims of interference with actual or prospective business relationships vis a vis his current or future patients, Plaintiff must offer sufficient proof of, inter alia, Defendants' "knowledge of [those] relationship[s] and not a mere awareness of the plaintiff's business dealings with others in general" Trau-Med, 71 S.W.3d at 701. At most, Plaintiff can show only that Defendants were generally aware of Plaintiff's patients in the aggregate. Plaintiff cannot produce sufficient evidence that Defendants were cognizant of specific business relationships between Plaintiff and his current patients, let alone Plaintiff's possible future patients, for purposes of this claim. Therefore, it should be dismissed.

B. Plaintiff has not presented sufficient evidence for either his tort or statutory claim of inducement to breach a contract.

The elements to an action for inducement to breach a contract are as follows: (1) there was a legal contract; (2) the wrongdoer had sufficient knowledge of the contract; (3) the wrongdoer intended to induce its breach; (4) wrongdoer acted maliciously; (5) the contract was breached; (6) the act complained of was the proximate cause of the breach; and (7) damages resulted from the breach. Baldwin v. Pirelli Armstrong Tire Corp., 927 F.Supp. 1046, 1055 (M.D. Tenn. 1996).¹⁴

¹⁴ The language of Section 47-50-109 of Tennessee Code Annotated is very similar: "It is unlawful for any person, by inducement, persuasion, misrepresentation, or other means, to induce or procure the breach or violation, refusal or failure to perform any lawful contract by any party thereto"

In the instant case, there is no evidence that Defendants *intended* to induce a breach of any contract. Additionally, Defendants submit that there has been no breach of a contract at all. Finally, Plaintiff has not produced any evidence that the alleged actions of Defendants caused any damages to Plaintiff. As a result, these claims should be dismissed.

C. Plaintiff has not presented any evidence of his claim for Interference with Prospective Economic Relationships.

The elements of a claim for an interference with a prospective economic relationship are (1) existence of a business relationship or expectancy; (2) knowledge by the interferer of the relationship or expectancy; (3) an intentional act of interference; (4) proof that the interference caused the harm sustained; and (5) damage to the plaintiff. Quality Auto Parts Co. v. Bluff City Buick Co., 876 S.W.2d 818, 823 (Tenn. 1994).

Once again, Plaintiff cannot show that Defendants ever intended to interfere with any of Plaintiff's alleged relationships, or that Defendants even have specific knowledge of the alleged relationships. Additionally, Plaintiff cannot prove that any damages resulted from his suspension. As a result, these claims should be dismissed.

VII. Plaintiff has not asserted any viable federal or state Constitutional claims.

A. Plaintiff's claims under the Tennessee Constitution fail as a matter of law.

Although Plaintiff apparently asserts violations of the Tennessee Constitution, (see Pl.'s Second Am. Compl. ¶ 28), Tennessee has not recognized an implied cause of action for damages based upon violations of the Tennessee Constitution. Bowden Bldg. Corp. v. Tenn. Real Estate Comm'n, 15 S.W.3d 434, 446 (Tenn. Ct. App. 2000) (citing Lee v. Ladd, 834 S.W.2d 323, 324 (Tenn. Ct. App. 1992) ("We have held, however, in prior cases that we know of no authority for the recovery of damages for a violation of the Tennessee Constitution by a state officer."); Cline v. Rogers, 87 F.3d 176, 179 (6th Cir. 1996)). As the Tennessee Court of Appeals has explained,

Under federal law, a person whose federal constitutional rights are violated by a federal officer can maintain a private cause of action for damages against the federal officer, even though no statute expressly creates such a cause of action. Tennessee, however, has not recognized any such implied cause of action for damages based upon violations of the Tennessee Constitution.

Bowden Bldg. Corp., 15 S.W.3d at 446 (citations omitted).

As a result, Plaintiff's claims under the Tennessee Constitution must be dismissed.

B. The decision to suspend Plaintiff did not violate his Equal Protection rights.

Plaintiff has failed to allege a cognizable Equal Protection claim. To do so, he "must allege that a person acting under color of state law deprived him of his rights, privileges or immunities secured [by] the Constitution or laws of the United States." Benjamin v. Schuller, 400 F.Supp.2d 1055, 1077 (S.D. Ohio 2005) (citing Parratt v. Taylor, 451 U.S. 527 (1981)). "Equal protection claims generally prohibit, among other things, the discriminatory administration of a law neutral on its face." Id. (citing Charles v. Baesler, 910 F.2d 1349, 1356 (6th Cir. 1990) (citations omitted)). Nowhere has Plaintiff made these allegations, and he has not produced any evidence of such.

Moreover, even assuming Plaintiff has sufficiently alleged an Equal Protection claim and has produced supporting evidence, the decision to summarily suspend Plaintiff can only be reviewed under a rational basis analysis for purposes of an Equal Protection claim. Id. at 1080. Specifically, Plaintiff must prove that "Defendants had no rational basis for revoking [Plaintiff's] medical privileges." Id. (holding that the plaintiff in that case "had not presented sufficient evidence to create a genuine issue of material fact as to whether Defendants had no rational basis for revoking his medical privileges."). Additionally, "[c]ourts afford great deference to the hospital decision-maker and must look primarily at whether the decision-maker 'relied on evidence that is reasonably related to the operation of the hospital and the attending medical

staff.” Id. (citing Yashon v. Hunt, 825 F.2d 1016, 1025 (6th Cir. 1987)).

In the instant case, it cannot be argued that the concern for the safety of individuals is not a rational reason to suspend Plaintiff’s privileges. Affording great deference to Defendants as the law requires, it is clear that the evidence they relied on in making this decision to suspend Plaintiff was reasonably related to the operation of Erlanger and the attending medical staff. Once again, a physical altercation had occurred, which in itself conjures up concerns of safety. Additionally, regardless of the alleged severity of the altercation, it caused a cardiovascular surgeon enough stress that he did not feel competent enough to carry out the rest of his procedures that day, which clearly invokes the safety of Erlanger’s patients.

Because of these concerns, Plaintiff has not presented sufficient evidence to create a genuine issue of material fact as to whether Defendants had no rational basis for revoking medical privileges.

C. The decision to suspend Plaintiff did not violate his due process rights.

The act of summary suspension is described as an “immediate action” to be taken to address certain urgent situations. (Med. Staff Bylaws § 4.2-1.) Under these circumstances, Plaintiff was granted all appropriate procedures that could be afforded.

Due process fundamentally requires that a plaintiff receive “the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” Yashon, 825 F.2d at 1022 (quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (internal citations omitted)). At its most basic level, therefore, due process simply requires notice that it is reasonably calculated to apprise all interested parties of an action and an opportunity to present their defense. Braswell v. Haywood Reg’l Med. Ctr., 352 F.Supp.2d 639, 645 (W.D.N.C. 2005). Due process, however, is a flexible concept, meaning that the procedural protections that are required in a specific situation depend

on the circumstances of that situation. Yashon, 825 F.2d at 1022.

It is important to remember that the scope of the court's review of a hospital's disciplinary action against a physician is "generally limited to determining whether the procedures used violated any federal rights and whether the administrative body was presented with substantial evidence to support its ultimate action." Id. at 1022. It is not the court's responsibility to review the merits of the charges made against the physician, but rather the court should give great deference to the hospital's decision about the physician's privileges. Id. (emphasis added).

In light of these parameters of judicial review, the Court should conclude that Plaintiff was provided sufficient due process related to the summary suspension of his privileges. Because a summary suspension is meant to be an immediate action to address an urgent situation, the meeting with Dr. Twiest, Dr. Blake, and Plaintiff provided Plaintiff with ample opportunity to defend his actions before he was actually suspended. Indeed, any other procedures would have rendered summary suspension impossible because it would not have allowed for "immediate" action. Keeping in mind that this analysis does not inquire into the merits of the charges against Plaintiff, it is clear that Plaintiff has no cause of action regarding his Constitutional rights.

VIII. The arguments of the other co-defendants are incorporated.

The arguments raised in the motions for summary judgment filed by the other co-defendants are incorporated here by reference as if set forth fully herein.

CONCLUSION

WHEREFORE, Defendants respectfully request the Court dismiss Plaintiff's claims against Defendants in their entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that the foregoing pleading has been filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. Mail and/or facsimile or hand delivery. Parties may access this filing through the Court's electronic filing system.

This 14th day of December, 2008.

MILLER & MARTIN PLLC

By: /s/W. Randall Wilson