

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

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|--|---|-------------------------------------|
| 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

Defendants Mitchell L. Mutter, M.D. (“Dr. Mutter”) and Daniel F. Fisher, M.D. (“Dr. Fisher”), (collectively “Defendants”), by and through counsel and pursuant to Fed. R. Civ. P. 12(b)(6), respectfully submit this Memorandum of Law in support of their Motion for Summary Judgment 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, 411 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. Doctors Mutter and Fisher recused themselves from the deliberations regarding the summary suspension of the Plaintiff and thus cannot be held liable for that decision.

Because Drs. Mutter and Fisher recused themselves from the decision to summarily suspend Plaintiff and the decisions regarding the renewal of Plaintiff's medical staff privileges, they have no liability to Plaintiff. It goes without saying that one cannot be held responsible for something in which he or she did not do. Courts have recognized this common sense concept. See, e.g., Stitzell v. York Mem'l Osteopathic Hosp., 754 F.Supp. 1061, 1063, 1068 (M.D. Penn. 1991) (citing the fact that the defendant had recused himself from voting on the plaintiff's clinical privileges in dismissing plaintiff's interference with a contract claim); Le Baud v. Frische, No. 97-6109, 1998 WL 537504 at *2 n.3, *7 n.6 (10th Cir. Aug. 20, 1998) (dismissing the plaintiff's antitrust claims where the defendant recused himself from the decision to revoke the plaintiff's staff privileges); Loxley v. Chesapeake Hosp. Auth., No. 97-2539, 1998 WL 827285 at *3 (4th Cir. Dec. 1, 1998) (dismissing the plaintiff's due process claims and allegations of conspiracy in part because the chairman of the hospital authority recused himself from the decision to suspend plaintiff's staff privileges).

As Plaintiff did in response to Defendant Erlanger's motion for summary judgment, (Court Doc. No. 230), it is anticipated Plaintiff will claim the facts are disputed regarding the recusal.⁴ However a review of the deposition testimony shows there is no factual dispute regarding the recusal of Drs. Fisher or Mutter.

Specifically, the facts with regard to Dr. Fisher are that on the day of the incident, Dr.

⁴ In Plaintiff's Response to Erlanger's Motion for Summary Judgment [Ct. Doc. No. 84, pp.13-14], Plaintiff states: "Dr. Monroe called Erlanger Chief of Staff Dr. Dan Fisher after the incident, Fisher then spoke to Dr. Twiest, and Fisher testified he first agreed with the suspension and then recused himself. (Fisher Deposition at 79-80). Also, Dr. Blankenbaker stated that Dr. Fisher participated in discussions during the peer review process. (Blankenbaker Deposition at p. 37-39). Further, Dr. Mutter allegedly recused himself and yet was advised of the actions taken. As previously noted, Dr. Mutter who practices with Dr. Monroe, then advised their office manager and other physicians within CHI of what had occurred. (Farmer Deposition p. 7-10)."

Monroe paged Dr. Fisher, and Dr. Fisher returned the call. Dr. Monroe spoke to Dr. Fisher for about two to three minutes and relayed the details of the altercation. (Fisher's 10/21/04 Depo. pp. 42-43). About thirty minutes later, Dr. Twiest paged Dr. Fisher, and Dr. Fisher returned his call. (Id. pp. 49-50). Dr. Twiest reported that there was a problem at Erlanger but stated he believed Dr. Fisher should recuse himself from dealing with it. (Id. p. 51). Dr. Fisher told Dr. Twiest he thought he probably already knew what was going on from his call with Dr. Monroe, and he agreed on the need for his recusal as well as Dr. Mutter's recusal. (Id.) Dr. Twiest told Dr. Fisher that he was calling him for informational reasons only given his position as Chief of Staff. (Id.; Twiest's 10/22/04 Depo. pp. 175-76) Before the phone call between Dr. Twiest and Dr. Fisher occurred, Dr. Twiest had already consulted with Dr. Shumaker and they had decided to move forward with the plan to summarily suspend the Plaintiff. (Fisher's 10/21/04 Depo. p. 80; Twiest's 10/22/04 Depo. p. 177)).⁵

The facts regarding Dr. Mutter's involvement on the day of the incident are undisputed. Dr. Twiest testified that he also called Dr. Mutter as the Vice Chief of Staff for information purposes only and that Dr. Mutter did not discuss any proposed action regarding the Plaintiff. (Twiest's 10/22/04 Depo. pp. 175-76). Dr. Twiest also testified he had already consulted with Dr. Shumaker about how to proceed with Plaintiff before calling Dr. Mutter. (Id. p. 177).

Plaintiff claims Dr. Fisher participated in the peer review discussion about Dr. Stratienco based upon the testimony of Dr. Blankenbaker, the Dean of the University of Tennessee College of Medicine at Chattanooga in 2004. Dr. Blankenbaker's deposition testimony simply does not support Plaintiff's claim. Dr. Blankenbaker testified that at the weekly medical staff leadership

⁵ In response to Erlanger's Motion for Summary Judgment, the Plaintiff presented the Court with what can most generously be described as a factually tortured reading of Dr. Fisher's deposition testimony to support their position that Dr. Fisher was involved in the summary suspension decision. A straightforward reading of the testimony on pp. 49-51 and 79-80 clearly shows there is no factual dispute with regard to Dr. Fisher's recusal in the summary suspension decision.

meetings that occurred in the weeks following the September 16 incident, the participants discussed the incident and the status of the proceedings. Dr. Blankenbaker testified that Dr. Mutter's personal practice whenever Dr. Stratienco was discussed was to leave the room. (Blankenbaker's 12/16/04 Depo. pp. 37-38 – relevant pages are attached to Motion as Exhibit G.) Additionally, Dr. Blankenbaker testified that in the meetings that occurred during the weeks soon after the incident, Dr. Fisher recused himself from the discussions at least until the MEC decided how to address the incident. (Blankenbaker Depo. 47-49)

Both the Stitzell and Frische cases cited above involve recusals from suspension decisions. In Stitzell, the plaintiff was an osteopathic neurosurgeon who had his privileges summarily suspended. Stitzell, 954 F.Supp. at 1063. In making the decision to suspend the plaintiff, the hospital medical director conducted an investigation that involved talking to several doctors on the staff. Id. In making this decision, however, the hospital medical director did not seek input from one of the defendants, Dr. Mitrick, who was also an osteopathic neurosurgeon. Id. Similarly, although Dr. Mitrick served on the Credentialing Committee, he was present at these meetings and offered technical information when requested by the committee. Id. at 1068. Dr. Mutter later abstained from voting on the decisions as to whether the plaintiff's suspension should be lifted, and "would often leave the room during the other physicians' conversations on the matter." Id. at 1068. As a result, the court held that Dr. Mitrick had "tenuous contact with the definitive actions taken against Dr. Stitzell" and he had not engaged in any improper conduct such that he was not liable under plaintiff's interference with a contract claim. Id.

In Frische, the Credentials Committee unanimously recommended to revoke all of the plaintiff's staff privileges. Frische, 1998 WL 537504 at *2. Although Dr. Frische was a member of the committee, he recused himself from the meeting and from the Hearing Panel that later

reviewed the recommendation. Id. at *2 n.3. As a result, the court dismissed the plaintiff's antitrust claims against Dr. Frische, noting that "there is nothing to tie [Dr. Frische] to the revocation of plaintiff's privileges." Id. at *7. The court noted:

Since Plaintiff has provided no support for his attempt to link Dr. Frische to the revocation of Plaintiff's privileges by suggesting that the person who initiated the incident report was a former employee of Dr. Frische, we agree with the district court's determination that Plaintiff's allegation is 'at best-nothing more than fanciful speculation.'

Id. at *7 n.6.

Similarly in this lawsuit, there is nothing to tie Dr. Fisher or Dr. Mutter to the investigation of or decision to summarily suspend Plaintiff or any of the subsequent decisions of how to handle his reappointment applications. This is simply no factual proof or disputed facts regarding Drs. Mutter's or Fisher's recusals from the disciplinary decisions regarding the Plaintiff. Plaintiff's reading of the deposition testimony cited in his brief in response to Erlanger's motion for summary judgment is incomplete, inaccurate and misleading. Although both men had some knowledge of the incident, they did not offer their input, nor was it requested, regarding how to address the situation. A review of the cited depositions will show the Court that both Drs. Mutter and Fisher were not involved in the decision to suspend Plaintiff. Because all Plaintiff has to offer to this Court regarding any meaningful involvement by Dr. Fisher or Dr. Mutter in Plaintiff's disciplinary action is "at best-nothing more than fanciful speculation," all claims against them should be dismissed.

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.

Defendants incorporate the arguments set forth in Dr. Shumaker's Memorandum of Law in Support of Summary Judgment on this topic as if set forth fully herein.

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

Defendants incorporate the arguments set forth in Dr. Shumaker's Memorandum of Law in Support of Summary Judgment on this topic as if set forth fully herein.

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.

Defendants incorporate the arguments set forth in Dr. Shumaker's Memorandum of Law in Support of Summary Judgment on this topic as if set forth fully herein.

- 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.

Defendants incorporate the arguments set forth in Dr. Shumaker's Memorandum of Law in Support of Summary Judgment on this topic as if set forth fully herein.

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

Defendants incorporate the arguments set forth in Dr. Shumaker's Memorandum of Law in Support of Summary Judgment on this topic as if set forth fully herein.

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

Defendants incorporate the arguments set forth in Dr. Shumaker's Memorandum of Law in Support of Summary Judgment on this topic as if set forth fully herein.

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

Defendants incorporate the arguments set forth in Dr. Shumaker's Memorandum of Law in Support of Summary Judgment on this topic as if set forth fully herein.

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

Defendants incorporate the arguments set forth in Dr. Shumaker's Memorandum of Law

in Support of Summary Judgment on this topic as if set forth fully herein.

1. Local Government Antitrust Act.

Defendants incorporate the arguments set forth in Dr. Shumaker's Memorandum of Law in Support of Summary Judgment on this topic as if set forth fully herein.

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

Defendants incorporate the arguments set forth in Dr. Shumaker's Memorandum of Law in Support of Summary Judgment on this topic as if set forth fully herein.

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.

Defendants incorporate the arguments set forth in Dr. Shumaker's Memorandum of Law in Support of Summary Judgment on this topic as if set forth fully herein.

B. The intracorporate immunity doctrine applies to conspiracy torts.

Defendants incorporate the arguments set forth in Dr. Shumaker's Memorandum of Law in Support of Summary Judgment on this topic as if set forth fully herein.

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.

Defendants incorporate the arguments set forth in Dr. Shumaker's Memorandum of Law in Support of Summary Judgment on this topic as if set forth fully herein.

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

Defendants incorporate the arguments set forth in Dr. Shumaker's Memorandum of Law in Support of Summary Judgment on this topic as if set forth fully herein.

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

Defendants incorporate the arguments set forth in Dr. Shumaker's Memorandum of Law in Support of Summary Judgment on this topic as if set forth fully herein.

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.

Defendants incorporate the arguments set forth in Dr. Shumaker's Memorandum of Law in Support of Summary Judgment on this topic as if set forth fully herein.

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

Defendants incorporate the arguments set forth in Dr. Shumaker's Memorandum of Law in Support of Summary Judgment on this topic as if set forth fully herein.

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

Defendants incorporate the arguments set forth in Dr. Shumaker's Memorandum of Law in Support of Summary Judgment on this topic as if set forth fully herein.

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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*Attorneys for the Defendant, Mitchell L. Mutter,
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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