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# [***McGary v. Williamsport Reg'l Med. Ctr.***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5RGG-8YK1-JKPJ-G1DR-00000-00&context=)

United States District Court for the Middle District of Pennsylvania

January 22, 2018, Decided; January 22, 2018, Filed

CIVIL ACTION NO. 12-cv-1742

**Reporter**

2018 U.S. Dist. LEXIS 10651 \*

SUZAN MCGARY, M.D., Plaintiff v. WILLIAMSPORT REGIONAL MEDICAL CENTER, et al., Defendants

**Subsequent History:** Rejected by, in part, Adopted by, in part, Summary judgment granted by [*McGary v. Williamsport Reg'l Med. Ctr., 2018 U.S. Dist. LEXIS 85380 (M.D. Pa., May 22, 2018)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5SCR-PMW1-JCJ5-22WC-00000-00&context=)

**Prior History:** [*McGary v. Williamsport Reg'l Med. Ctr., 2013 U.S. Dist. LEXIS 199377 (M.D. Pa., Sept. 30, 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5NFB-57N1-F04F-40M4-00000-00&context=)

**Core Terms**

surgery, cardiothoracic, Defendants', privileges, surgeon, geographic, By-Laws, monopolize, ***antitrust***, medical staff, conspire, anticompetitive, credentialing, recommendations, concerted action, conspiracy, summary judgment motion, matter of law, hospitals, entities, monopoly, parties, argues, restraint of trade, services, third party beneficiary, procedures, effects, prices, specific intent

**Counsel:** **[\*1]**For Suzan McGary, M.D., Plaintiff: Charles E. Wasilefski, LEAD ATTORNEY, Peters & Wasilefski, Harrisburg, PA.

For Williamsport Regional Medical Center, Susquehanna Health System, George Manchester, M.D., Scott Croll, M.D., John Burks, M.D., Mark A Osevala, D.O., Defendants: Brian J. Bluth, LEAD ATTORNEY, J. David Smith, Richard F. Schluter, McCormick Law Firm, Williamsport, PA.

**Judges:** William I. Arbuckle, United States Magistrate Judge. BRANN, D.J.

**Opinion by:** William I. Arbuckle

**Opinion**

REPORT AND RECOMMENDATION REGARDING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Doc. 41)

I. INTRODUCTION

Plaintiff Suzan McGary, M.D. (Dr. McGary) is a double board certified cardiothoracic surgeon who practiced cardiothoracic surgery at WRMC[[1]](#footnote-0)1 from 1999 to 2007. She moved west in 2007 and in 2012 reapplied to WRMC, expecting to once again practice her profession there. When her application for "privileges" was rejected by the local hospital, she suspected that economics, not medicine, was the real reason. She cried "foul" and sued.

Laws governing competition are found in over two millennia of history. Roman Emperors and Mediaeval monarchs alike used tariffs to stabilize prices or support local production. The formal study of "competition"**[\*2]** began in earnest during the 18th century with such works as Adam Smith's The Wealth of Nations. Different terms were used to describe this area of law, including "restrictive practices," "the law of monopolies," "combination acts," and the "restraint of trade."[[2]](#footnote-1)2

In this case, Dr. McGary's lawyers alleged the Defendants: violated her due process rights by denying her right to pursue her chosen profession (Count 1); violated *Section 1* and *Section 2 of the Sherman Act* (Count 2); denied her due process and equal protection under the *5th* and *14th Amendments to the U.S. Constitution* (Count 3); breached a third party beneficiary agreement (Count 4); interfered with prospective contractual relationships (Count 5); and conspired in restraint of trade (Count 6).

Dr. McGary sought injunctive relief to process her application for privileges, costs of litigation including attorney's fees, monetary damages incurred as a result of being prevented from practicing surgery, treble damages, and interests and costs.

To obtain these cures, Dr. McGary sued a total of six (6) individuals and institutions:

a. Williamsport Regional Medical Center ("WRMC");

b. Susquehanna Health System ("SHS"), the owner of WRMC;

c. George Manchester, M.D. ("Dr. Manchester"), SHS Executive**[\*3]** Vice President and Chief Medical Officer of WRMC;

d. Scott Croll, M.D. ("Dr. Croll"), employee of SHS's wholly owned subsidiary Susquehanna Physicians Services ("SPS") and Chairman of the WRMC Department of Surgery;

e. John Burks, M.D. ("Dr. Burks"), SPS employee and Director of the WRMC Heart and Vascular Institute; and

f. Mark A. Osevala, D.O. ("Dr. Osevala"), a SPS employee and the only cardiothoracic surgeon with treatment privileges at WRMC, (collectively, "Defendants").

Her six (6) claims were reduced to four (4) by motions to dismiss. (Doc. 22). The Defendants have responded to her remaining claims by filing a Motion for Summary Judgment (Doc. 41), arguing that there are no disputed issues of material facts and that they are entitled to win as a matter of law.

After careful review, we have concluded that the court should GRANT Defendants' Motion for Summary Judgment with respect to Dr. McGary's claims for:

(1) Violation of *Section 1* of the Sherman Act (Count 2);

(2) Conspiracy to Monopolize under *Section 2* of the Sherman Act (Count 2);

(3) Conspiracy in Restraint of Trade (Count 6).

Further, the court should DENY Defendants' Motion for Summary Judgment with respect to Dr. McGary's claims for:

(1) Illegal**[\*4]** Monopoly under *Section 2* of the Sherman Act (Count 2);

(2) Unlawful Attempt to Monopolize under *Section 2* of the Sherman Act (Count 2);

(3) Breach of Third Party Beneficiary Agreement (Count 4);

(4) Interference with Prospective Contractual Relationships (Count 5);

II. PROCEDURAL HISTORY

On August 31, 2012, Dr. McGary filed a Complaint alleging six counts against Defendants. (Doc. 1). On September 26, 2012, Defendants filed a Motion to Dismiss. (Doc. 6).

On October 30, 2012, Dr. McGary filed an Amended Complaint (Doc. 10), in which she asserted the following claims: (1) Injunctive Relief; (2) Violation of Sherman Act—*15 U.S.C.A. Section 1* and *Section 2*; (3) Violation of the *5th* and *14th Amendments to the U.S. Constitution*—Denial of Due Process and Equal Protection; (4) Breach of Third Party Beneficiary Agreement; (5) Interference with Prospective Contractual Relationships; (6) Conspiracy in Restraint of Trade. On November 13, 2012, Defendants filed a Motion to Dismiss the Amended Complaint, (Doc. 13), along with a corresponding Brief in Support (Doc. 16) two weeks later. On December 17, 2012, Dr. McGary filed a Brief in Opposition to the Motion to Dismiss. (Doc. 17).

On September 30, 2013, we issued a Report (Doc. 21) recommending that Counts 1 and 3 of the Amended Complaint (Doc.**[\*5]** 10) be dismissed. On February 21, 2014, Judge Matthew W. Brann issued an Order (Doc. 22) adopting our Report (Doc. 22). The claims for injunctive relief, as well as the claims for violations of due process and equal protection (Counts 1 and 3, above) were dismissed, and Dr. McGary's claims for violation of the Sherman Act and the state law claims (Counts 2, 4, 5, and 6, above) were permitted to proceed. (Doc. 22).

On September 26, 2016, Defendants filed the instant Motion for Summary Judgment (Doc. 41), along with a corresponding Statement of Facts (Doc. 42). A Brief in Support followed on October 11, 2016. (Doc. 45). Dr. McGary filed her Brief in Opposition (Doc. 49) as well as her Answer to Statement of Facts (Doc. 48) on November 1, 2016. On November 15, 2016, Defendants filed their Reply to the Brief in Opposition. (Doc. 50).

III. FACTS OF RECORD

SHS[[3]](#footnote-2)3 is a non-profit corporation licensed to do business in Pennsylvania. (Doc. 48, ¶ 1). Williamsport Regional Medical Center ("WRMC"), a wholly owned subsidiary of SHS, is a non-profit organization that was formed on August 30, 1873. (Doc. 48, ¶¶ 3, 4).

Defendants assert that non-party SPS[[4]](#footnote-3)4 is a non-profit corporation and wholly owned subsidiary**[\*6]** of SHS. (Doc. 48, ¶ 6). Defendants describe SPS as the "physician employment arm of SHS." (Doc. 42, ¶7).

At all times relevant to Dr. McGary's claims, Dr. Manchester was employed by SHS as its Chief Medical Officer, (Doc. 48, ¶ 12), Dr. Croll was employed by SPS as a general surgeon, (Doc. 48, ¶ 13), Dr. Burks was employed by SPS as a cardiologist, (Doc. 48, ¶ 14), and Dr. Osevala was employed by SPS as a cardiothoracic surgeon, (Doc. 48, ¶ 15).

Defendants claim that Dr. Manchester, through his employment by Susquehanna Health, and Drs. Croll, Burks, and Osevala, through their employment by SPS, enjoy a unity of economic interests. (Doc. 42, ¶ 16). Plaintiff disputes this claim. (Doc. 48, ¶ 16).

Dr. McGary is a physician licensed to practice medicine and surgery in the Commonwealth of Pennsylvania. (Doc. 10, ¶ 1). Dr. McGary was Board Certified by the American Board of Surgery in 1994 and re-certified in 2004. *Id.* at ¶ 12. Dr. McGary was also certified by the American Board of Thoracic Surgery. *Id.*

She is a graduate of the University of Texas Medical School. *Id.* at ¶ 11. She served residencies in general surgery and cardiothoracic surgery at the Pennsylvania State University, Milton S.**[\*7]** Hershey Medical Center, serving as Chief Resident and Clinical Instructor for both the Division of General Surgery and the Division of Cardiothoracic Surgery. *Id.* Dr. McGary was also a Research Fellow in the Division of Cardiothoracic Surgery and Artificial Organs at the Pennsylvania State University, Milton S. Hershey Medical Center. *Id.*

Dr. McGary practiced cardiothoracic surgery at WRMC from 1999 to 2007. Defendants claim she was an independent physician with cardiothoracic surgery privileges for the entire period of time. (Doc. 42, ¶ 18). Dr. McGary claims she was an SHS employee from 1999 to 2001 and a private practitioner with cardiothoracic surgery privileges at WRMC from 2002 to 2007. (Doc. 48, ¶ 18).

Dr. McGary and her then-husband, Dr. Aufiero were "leaders of the [cardiothoracic] surgery program at WRMC." (Doc. 48, ¶ 19). Dr. McGary alleges that Dr. Aufiero provided input on the specific requirements for surgery privileges that were in place in 2012. (Doc. 48, ¶ 20). Defendants allege Dr. McGary worked jointly with Dr. Aufiero to establish these criteria. (Doc. 42, ¶ 20).

Defendants allege that, during the period she treated patients at WRMC, Dr. McGary was the subject of a**[\*8]** series of complaints regarding her conduct as a physician, her interactions with staff members, and the reputation of the cardiothoracic surgery program generally. (Doc. 42, ¶¶ 21-25). Dr. McGary categorically denies these claims. (Doc. 48, ¶¶ 21-25).

Dr. McGary closed her private practice in Williamsport in 2007. (Doc. 48, ¶ 26). She did not have another job at that time. (Doc. 48, ¶ 27).

Defendants allege the cardiothoracic surgery program at WRMC was adversely affected by the departure of Drs. McGary and Aufiero. (Doc. 42, ¶¶ 28, 29). Dr. McGary denies this allegation. (Doc. 48, ¶¶ 28, 29).

Subsequent to her departure from WRMC, Drs. McGary and Aufiero practiced cardiothoracic surgery at Bloomington Hospital in Bloomington, Indiana for approximately one year. (Doc. 48, ¶ 31).

Drs. McGary and Aufiero divorced in 2011. (Doc. 48, ¶ 30). Following her divorce, Dr. McGary then moved to Hermitage, Pennsylvania where she practiced cardiothoracic surgery until mid-2011. (Doc. 48, ¶ 32).

In late 2011, Dr. McGary telephoned Dr. McCauley, a pulmonologist at WRMC, and expressed her interest in applying for a position as a cardiothoracic surgeon at WRMC. (Doc. 48, ¶ 33). Dr. McGary was not offered**[\*9]** a position at that time. (Doc. 48, ¶ 35).

Dr. McGary applied for privileges at WRMC as a private physician in January of 2012. (Doc. 48, ¶ 36). At the time of her application, the credentialing criteria for cardiothoracic surgery privileges required a surgeon to have performed at least one hundred (100) heart surgeries and one hundred (100) lung surgeries (the "100/100 criteria") within the year preceding the application. (Doc. 42, ¶ 37). The parties dispute whether Dr. McGary and her then-husband Dr. Aufiero were involved in creating the criteria during their first stint with WRMC. (Doc. 48, ¶ 38). The credentialing criteria stated:

**Minimum requirements for initial appointment**:

1. All individuals must be Board certified or an Active Candidate seeking certification by the American Board of Thoracic Surgery.

2. Individuals who have completed their training more than one year prior to application must present a record of at least 100 Cardiac procedures completed per year as primary surgeon if they are requesting Cardiac Procedures and at least 100 Thoracic procedures completed per year as primary surgeon if they are requesting Thoracic Procedures.

(Doc. 42, ¶ 39) (boldface in original). Defendants**[\*10]** claim the criteria must be "more extensive than larger programs like Hershey, UPMC, or Penn, because those programs have multiple [cardiothoracic] surgeons who can help one another." (Doc. 42, ¶ 41).

Dr. McGary performed thirty-seven (37) open heart procedures and fifteen (15) lung procedures in the year before she submitted her application for treating privileges at WRMC. (Doc. 42, ¶ 43). Dr. Manchester deemed Dr. McGary's application "incomplete" although Dr. McGary alleges she submitted all required information. (Doc. 48, ¶ 44). Dr. Manchester conferred with Drs. Croll and Burks regarding the application, but neither doctor was given the opportunity to review Dr. McGary's application. (Doc. 48, ¶ 45). Dr. McGary asserts that Dr. Manchester's actions were contradictory to the procedures provided in the Medical Staff By-Laws, and that he lacked the authority to do so. *Id.*

The Medical Staff By-Laws provide:

The completed application form shall be submitted to the Medical Director's Office along with any application fee. Upon receipt of the application, the Medical Director shall notify the CEO of Susquehanna Health and the President of the Medical Staff. A summary of the application information**[\*11]** shall be transmitted to the Credentials Committee and the Chairman of each department in which the applicant seeks clinical privileges.

(Doc. 48, ¶ 48). The By-Laws further provide that the Chairman of the Department shall review the applicant's information, may interview the applicant, and shall transmit a written report within thirty (30) days to the Credentials Committee ("CC") with the Chairman's recommendations and reasoning for such recommendations. (Doc. 48, ¶ 48). In addition, within sixty (60) days of receiving the Department Chairman's report, the CC, which may also interview the applicant, is required to submit a written report containing its recommendations and rationales to the Medical Executive Committee ("MEC"). (Doc. 48, ¶ 48). Within sixty (60) days of receiving the CC's report, the MEC is required to make its recommendations as to the appointment. (Doc. 48, ¶ 48). If the MEC recommendation is unfavorable to an applicant's privileges request, the By-Laws allow for appeal rights and a hearing. (Doc. 48, ¶ 48). Finally, the By-Laws state that a "practitioner/applicant must exhaust all remedies afforded by these By-Laws before resorting to legal recourse through the courts."**[\*12]** *Id.*

Dr. Manchester denied Dr. McGary's application on March 30, 2012. (Doc. 42, ¶ 49). Dr. McGary alleges Dr. Manchester did not have the power to unilaterally deny and application. (Doc. 48, ¶ 49).

Thereafter, Dr. McGary suggested that changes be made to credentialing process "in order to better represent the number of surgeries available and the criteria used by similarly situated hospitals." (Doc. 48, ¶ 50). In support of her position that WRMC's credentialing criteria were too stringent, Dr. McGary researched the credentialing criteria of "like hospitals in the area," including Guthrie, Wilkes-Barre, and Hershey, (Doc. 48, ¶ 53), as well as Temple, Geisinger, and University of Pennsylvania, (Doc. 48, ¶ 54). Upon consideration of Dr. McGary's research and discussion with the CC, (Doc. 48, ¶¶ 55-58), Defendants revised their cardiothoracic surgery criteria as follows:

**Minimum requirements for initial appointment**

1. All individuals must be Board certified or an Active Candidate seeking certification by the American Board of Thoracic Surgery.

2. Individuals who have completed their training more than one year prior to application must present a record of at least:

If requesting **cardiac privileges [\*13]**, please provide documentation of performance of at least 100 major cardiac procedures completed as primary surgeon over the past two years, 50 of which must have been performed in the last 12 months

If requesting **valve replacement privileges**, please provide documentation of performance of at least 30 valve replacement procedures completed as primary surgeon over the past two years, 15 of which must have been performed in the last 12 months

If requesting **mitral valve repair privileges**, please provide documentation of performance of at least 20 mitral valve repair procedures completed as primary surgeon over the past two years, 10 of which must have been performed in the last 12 months

If requesting **thoracic privileges**, please provide documentation of performance of at least 75 thoracic procedures completed as primary surgeon over the past two years

If requesting **esophagectomy privileges**, please provide documentation of performance of at least 10 esophagectomy cases performed over the past 24 months.

(Doc. 42, ¶ 59).

Dr. McGary's surgery counts of thirty-seven (37) open heart procedures and fifteen (15) lung procedures were also insufficient to meet these revised criteria. (Doc. 42, ¶ 60).**[\*14]** Dr. McGary points out the Dr. Osevala would be similarly unable to meet these revised criteria. (Doc. 48, ¶ 60).

With these facts in mind, we now turn to the legal standard.

IV. LEGAL STANDARD

We will examine the motion for summary judgment under a well-established standard. [*Rule 56(a) of the Federal Rules of Civil Procedure*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F165-00000-00&context=) provides as follows:

A party may move for summary judgment, identifying each claim or defense - or the part of each claim or defense - on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

For purposes of [*Rule 56*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F165-00000-00&context=), a fact is material if proof of its existence or nonexistence might affect the outcome of the suit under the applicable substantive law. [*Haybarger v. Laurence Cnty. Adult Prob. & Parole, 667 F.3d 408, 412 (3d Cir. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:54VM-7SN1-F04K-K07S-00000-00&context=) (quoting [*Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6H80-0039-N37M-00000-00&context=). For an issue to be genuine, "all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Id.* (quoting [*Anderson, 477 U.S. at 248-49*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6H80-0039-N37M-00000-00&context=)).

Accordingly, the moving party must show that if the evidence of record were reduced to admissible**[\*15]** evidence in court, it would be insufficient to allow the nonmoving party to carry its burden of proof. *See* [*Celotex v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6HC0-0039-N37R-00000-00&context=). Provided the moving party has satisfied this burden, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." [*Scott v. Harris, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NM5-XWV0-004C-002K-00000-00&context=). Instead, if the moving party has carried its burden, the non-moving party must then respond by identifying specific facts, supported by evidence, which show a genuine issue for trial, and may not rely upon the allegations or denials of its pleadings. *See* [*Marten v. Godwin, 499 F.3d 290, 295 (3d Cir. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4PGJ-5NJ0-TXFX-522Y-00000-00&context=); *see also* [*Fed. R. Civ. P. 56(c)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2421-6N19-F165-00000-00&context=).

In adjudicating the motion, the court must view the evidence presented in the light most favorable to the opposing party, [*Anderson, 477 U.S. at 255*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6H80-0039-N37M-00000-00&context=), and draw all reasonable inferences in the light most favorable to the non-moving party, [*Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1Y90-008H-V1YT-00000-00&context=). Where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true. *Id.* Additionally, the court is not to decide whether the evidence unquestionably favors one side or the other, or to make credibility determinations, but instead must decide whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. [*Id. at 252*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6H80-0039-N37M-00000-00&context=); *see also* [*Big Apple BMW, 974 F.2d at 1363*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1Y90-008H-V1YT-00000-00&context=). In reaching this determination, the Third Circuit has instructed:**[\*16]**

To raise a genuine issue of material fact . . . the opponent need not match, item for item, each piece of evidence proffered by the movant. In practical terms, if the opponent has exceeded the "mere scintilla" threshold and has offered a genuine issue of material fact, then the court cannot credit the movant's version of events against the opponent, even if the quantity of the movant's evidence far outweighs that of its opponent. It thus remains the province of the factfinder to ascertain the believability and weight of the evidence.

*Id.* In contrast, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." [*Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7P90-0039-N51W-00000-00&context=) (internal quotation marks omitted); [*NAACP v. North Hudson Reg'l Fire & Rescue, 665 F.3d 464, 476 (3d Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:54FY-PKW1-F04K-K06W-00000-00&context=).

Often described as a legal test that is easy to state but hard to apply, we now turn to the facts of this case to determine if there are genuine issues of material fact requiring a trial.

V. DISCUSSION

In their Motion for Summary Judgment (Doc. 41), Defendants allege that they are entitled to judgment as a matter of law with respect to Count Two (Sherman Act Claims),[[5]](#footnote-4)5 Count Four (Breach of Third Party Beneficiary Agreement), Count Five (Interference with Prospective**[\*17]** Contractual Relationships), and Count Six (Conspiracy in Restraint of Trade). Dr. McGary disagrees. We will address each of these claims below.

A. *SECTION 1 OF THE SHERMAN ACT*

*Section 1* of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states . . . is declared to be illegal." *15 U.S.C. § 1*. To prove a violation of *Section 1*, a plaintiff must show:

(1) concerted action by the defendants;

(2) that produced anti-competitive effects within the relevant product and geographic markets;

(3) that the concerted actions were illegal; and

(4) that it was injured as a proximate result of the concerted action.

[*Gordon v. Lewistown Hosp., 423 F.3d 184, 207 (3d Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H3C-5350-0038-X43N-00000-00&context=) (citing [*Petruzzi's IGA Supermarkets v. Darling-Del. Co., 998 F.2d 1224, 1229 (3d Cir. 1993))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-F990-003B-P05S-00000-00&context=).

For the reasons explained below, we recommend that Defendants' Motion for Summary Judgment be GRANTED with respect to Dr. McGary's claim under *Section 1* of the Sherman Act.

ELEMENT ONE: CONCERTED ACTION BY THE DEFENDANTS

"The very essence of a *section 1* claim, of course, is the existence of an agreement." [*Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 639 (3d Cir. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-20F0-006F-M27R-00000-00&context=) (quoting [*Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 999 (3d Cir. 1994))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1Y40-003B-P0KS-00000-00&context=). A violation of *Section 1* requires a "unity of purpose or a common design and understanding or a meeting of the minds in an unlawful arrangement." [*Siegel Transfer v. Carrier Express, 54 F.3d 1125, 1131 (3d Cir. 1995)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-F9W0-001T-D4D0-00000-00&context=) (quoting [*Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3C80-003B-S323-00000-00&context=). Independent or unilateral action is therefore insufficient. [*Gordon v. Lewistown Hosp., 423 F.3d 184, 207 (3d Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H3C-5350-0038-X43N-00000-00&context=). The concerted action requirement**[\*18]** is satisfied "where two or more distinct entities have agreed to take action against the plaintiff." *Id.*

Defendants assert that Dr. McGary cannot prove concerted action because Defendants are incapable of conspiring with one another as a matter of law. (Doc. 45, pp. 21-25). Specifically, Defendants argue that, SHS cannot conspire with its wholly owned subsidiary WRMC, and that the Doctor Defendants cannot as a matter of law conspire with one-another or with their employers (SHS and WRMC). *Id.* In response, Dr. McGary argues that the Doctor Defendants can conspire with one another if they are acting in their own personal interest, and that a material issue of fact exists as to whether the Doctor Defendants were acting in their own personal interest. (Doc. 49, p. 19).

To resolve the issues raised here, our inquiry is three-fold. First, we must decide whether SHS and its wholly owned subsidiary WRMC are capable of conspiring as a matter of law. Second, we must decide whether the Doctor Defendants are capable of conspiring with their employer as a matter of law. Third, we must decide whether the Doctor Defendants are capable of conspiring with one another as a matter of law, and whether there**[\*19]** is a genuine issue of fact as to whether they did so in this case.

With respect to our first and second inquiries, the question of whether certain entities are capable of conspiring with each other or their employees within the meaning contemplated under *Section 1* of the Sherman Act was addressed by the Supreme Court in Copperweld, [*467 U.S. at 752*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3C80-003B-S323-00000-00&context=). In holding that a parent company is incapable of conspiring with its wholly owned subsidiary, the *Copperweld* Court concluded that concerted action requires a combination of "separate economic actors pursuing separate economic interests." [*Id. at 769*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3C80-003B-S323-00000-00&context=). By this reasoning, "officers or employees of the same firm do not provide the plurality of actors imperative for a *§ 1* conspiracy." *Id.*

However, an issue of concerted action requires an inquiry into "substance, not form," [*Am. Needle Inc. v. Nat'l Football League, 560 U.S. at 195 (2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YJ2-MVT1-2RHS-K0NF-00000-00&context=) (quoting [*Copperweld, 467 U.S. at 773, n.21 (1984))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3C80-003B-S323-00000-00&context=), and courts have recognized that concerted action may exist in an employment scenario where an employee acts not as an agent of the employer, but rather in pursuit of the employee's own personal economic interest. *See* [*McMorris v. Williamsport Hosp., 597 F. Supp. 899, 914 (M.D. Pa. 1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-9KX0-0054-53FR-00000-00&context=) (citing [*Johnston v. Baker, 445 F.2d 424, 427, 8 V.I. 413 (3d Cir. 1971))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9WH0-0039-X53X-00000-00&context=); *see also* [*Weiss v. York Hosp., 745 F.2d 786, 814-15 (3d Cir. 1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-V930-003B-G409-00000-00&context=).

Applying these principles to the facts of this case, we agree with Defendants that SHS cannot, as a matter of law, engage in a conspiracy with its wholly owned subsidiary WRMC or with its medical**[\*20]** staff in the manner alleged. [*Weiss, 745 F.2d at 814-15*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-V930-003B-G409-00000-00&context=) (holding that a "hospital cannot legally conspire with its medical staff"). Simply put, it is uncontested that WRMC is a wholly owned subsidiary of SHS; two such entities cannot form a combination subject to liability under *Section 1*. Further, SPS, as the "physician employment wing" of SHS, likewise cannot form a combination with SHS for the same reason.

With respect to the third inquiry, the Third Circuit has addressed whether concerted action between members of a hospital's medical staff can support a *Section 1* claim. In *Weiss v. York Hospital*, a plaintiff doctor brought a *section 1* claim against the independent doctors holding staff privileges at York Hospital, alleging that he was denied privilege solely because he was a D.O. rather than an M.D. [*745 F.2d at 786*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-V930-003B-G409-00000-00&context=). The Third Circuit Court of Appeals in *Weiss* held that although a "hospital cannot legally conspire with its medical staff," concerted action between members of a medical staff may support a *Section 1* claim. [*745 F.2d at 814-15*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-V930-003B-G409-00000-00&context=) (concluding that a "medical staff is a combination of individual doctors and therefore that any action taken by the medical staff satisfies the "contract, combination, or conspiracy" requirement of *Section 1*."). The court determined that the doctors,**[\*21]** though employees of the same hospital, were nonetheless independent actors who pursued their own interests and competed with each other for patients. [*Id. at 816*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-V930-003B-G409-00000-00&context=) ("Each staff member, therefore, has an economic interest separate from and in many cases in competition with the interests of other medical staff members."); *see also* [*Mathews, 87 F.3d at 639*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-20F0-006F-M27R-00000-00&context=) (holding that an intra-enterprise conspiracy requires "a conscious commitment by the medical staff to coerce the hospital into accepting its recommendation" made during a peer review process); *accord* [*Gordon, 423 F.3d at 209*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H3C-5350-0038-X43N-00000-00&context=).

In its most recent iteration of *Copperweld*, the Supreme Court stated that "[a]greements made within a firm can constitute concerted action covered by *§ 1* when the parties to the agreement act on interests separate from those of the firm itself . . . ." [*Am. Needle, Inc., 560 U.S. at 200*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YJ2-MVT1-2RHS-K0NF-00000-00&context=). In support of this statement, the Court approvingly cited cases standing for both the proposition that a hospital can conspire with its staff, and the proposition that a hospital cannot conspire with its staff as a matter of law. [*Id. at 200, n.8*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YJ2-MVT1-2RHS-K0NF-00000-00&context=); *compare* [*Bolt v. Halifax Hosp. Med. Ctr., 891 F.2d 810, 818-19 (11th Cir. 1990)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7G20-003B-5459-00000-00&context=) *with* [*Weiss, 745 F.2d at 815 (1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-V930-003B-G409-00000-00&context=); [*Oksanen v. Page Mem'l Hosp., 945 F.2d 696, 706 (4th Cir. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8TV0-008H-V1SW-00000-00&context=). The effect of [*American Needle*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YJ2-MVT1-2RHS-K0NF-00000-00&context=) on the question of conspiracy between a hospital and its medical staff is unclear. Because of this ambiguity, we see no reason to disturb Third Circuit**[\*22]** precedent as stated in [*Weiss*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-V930-003B-G409-00000-00&context=). Accordingly, we disagree with Defendants and find that, as a matter of law the Doctor Defendants are capable of conspiring with one-another under the Sherman Act.

Although they are legally capable of doing so, we find that there is no dispute of material fact as to whether the Doctor Defendants engaged in concerted action. There is a question as to whether Dr. Osevala had a personal economic interest apart from the SHS and WRMC.[[6]](#footnote-5)6 However, to the extent that Dr. McGary argues that Dr. Osevala conspired with Doctors Manchester, Croll, or Burks, she has failed to provide evidence from which any reasonable jury could find that the other doctors were acting in their own personal interest. "[P]romoting the WRMC brand" and "protect[ing] the economic interest of WRMC from the competition of McGary" appear to be actions undertaken by the doctors as agents of WRMC. (Doc. 49, p. 21). Doctors Manchester, Croll, and Burks are not cardiothoracic surgeons. There is no evidence that their individual practices would be impacted if treatment privileges were awarded to a new cardiothoracic surgeon.

Accordingly, we find that Dr. McGary has failed to demonstrate that any**[\*23]** two or more Defendants legally capable of engaging in concerted action may have done so.

Thus, Dr. McGary's *Section 1* claim fails as a matter of law for inability to show a cognizable form of concerted action. In the interest of completeness, however, we have addressed the remaining elements of Dr. McGary's *Section 1* claim below.

ELEMENT TWO: ANTICOMPETITIVE EFFECTS IN THE RELEVANT GEOGRAPHIC MARKET

To determine whether the alleged conduct by Defendants resulted in any anticompetitive effect on the relevant geographic market our inquiry is two-fold. First, we must determine whether there is any genuine dispute as to the relevant product market and geographic market in this case. Second, we must determine whether Dr. McGary has alleged sufficient facts to rebut Defendants' allegation that Defendants' actions did not result in any impermissible anticompetitive effects.

With respect to our first inquiry, the parties agree that the relevant product market is the market for specialized cardiothoracic surgery services, but disagree as to the relevant geographic market. Dr. McGary submitted the report of David M. Eisenstadt, Ph.D., ("Dr. Eisenstadt"), an ***antitrust*** economist with nearly forty (40) years of experience.**[\*24]** (Doc. 49, p. 25; Doc. 42-11, ¶¶ 1, 2). Dr. Eisenstadt concluded in his report that "because of WRMC's location and its uniqueness, Lycoming County is a relevant geographic market." (Doc. 42-11, ¶ 38). Per Dr. Eisenstadt's report, WRMC has 70% market share in Lycoming County and 48% market share in the "Lycoming County Area." (Doc. 42-11, ¶ 40). Dr. McGary notes that Defendants have not submitted the testimony of an expert witness in support of their argument that Dr. McGary's proposed geographic market is too narrow. (Doc. 49, p. 26). Rather, Defendants simply assert "that there is a healthy competition for [cardiothoracic] surgery patients across a regional service area within Central Pennsylvania." (Doc. 45, p. 34).

We need not make a determination on the territory of the geographic market itself; we must simply determine whether there exists a genuine issue of material fact on the issue. Upon consideration of the findings in Dr. Eisenstadt's report and Defendants' proffered objections to it, it is clear that the issue of the inclusion or exclusion of competitors in the geographic market is not appropriate for a summary judgment determination. As such, we agree with Dr. McGary that**[\*25]** there is, at minimum, a genuine dispute regarding the parameters of the relevant geographic market at issue.

With respect to our second inquiry, whether Defendants' actions resulted in anti-competitive effects, "courts long ago realized that literal application of section one would render virtually every business arrangement unlawful." [*United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CS70-003B-P30F-00000-00&context=); *see also* [*Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5YH0-003B-H0VW-00000-00&context=). That is, "[b]ecause even beneficial business contracts or combinations restrain trade to some degree, section one has been interpreted to prohibit only those contracts of combinations that are 'unreasonably restrictive of competitive conditions.'" [*Brown, 5 F.3d at 668 (1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CS70-003B-P30F-00000-00&context=) (citing [*Standard Oil Co. v. United States, 221 U.S. 1, 58, 31 S. Ct. 502, 55 L. Ed. 619 (1911))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8XR0-003B-H0BC-00000-00&context=).

As a result, most courts analyze restrictions under the traditional "rule of reason." [*Brown, 5 F.3d at 668 (1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CS70-003B-P30F-00000-00&context=) (citing [*Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9CH0-003B-S1JP-00000-00&context=).

The rule of reason requires the fact-finder to "weigh[ ] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." The plaintiff bears an initial burden under the rule of reason of showing that the alleged combination or agreement produced adverse, anti-competitive effects within the relevant product and geographic markets.

[*Brown, 5 F.3d at 668 (1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CS70-003B-P30F-00000-00&context=) (citing [*Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 722 (3d Cir. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6R40-008H-V0Y4-00000-00&context=), *cert. denied*, *505 U.S. 1221, 112 S. Ct. 3034, 120 L. Ed. 2d 903 (1992)*; [*Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 166 (3d Cir. 1979))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-WB20-0039-M3XD-00000-00&context=). "The plaintiff may satisfy this burden by proving**[\*26]** the existence of actual anticompetitive effects, such as reduction of output, *see* [*FTC v. Indiana Federation of Dentists, 476 U.S. 447, 460-61, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6V80-0039-N3PM-00000-00&context=), increase in price, or deterioration in quality of goods or services, *see* [*Tunis Bros., 952 F.2d at 728*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6R40-008H-V0Y4-00000-00&context=)." Because such proof is often impossible to provide, courts will typically instead allow proof of "market power," or "the ability to raise prices above those that would prevail in a competitive market." [*Brown, 5 F.3d at 668 (1993)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-CS70-003B-P30F-00000-00&context=) (citing 7 P. Areeda, ***Anti-trust*** *Law*, ¶ 1503, at 376 (1986)).

Anticompetitive effects are shown by (a) actual evidence of anticompetitive effects, or (b) anticompetitive effects inferred from Defendants' market power. [*Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268, 276 (3d Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WYP-XMR0-0038-X0JS-00000-00&context=) (citing [*Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1367 (3d Cir. 1996))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RTX-3T70-006F-M3GB-00000-00&context=). Market power is defined as the ability to profitably raise prices above marginal cost, meaning the "ability to raise prices above those that would prevail in a competitive market." *Id.*

The parties' focus their analyses on whether anticompetitive effects can be inferred from Defendants' market power, rather than actual evidence of anticompetitive effects. (Doc. 45, pp. 26-28; Doc. 49, pp. 22-27). Essentially, Defendants argue that Dr. McGary cannot apply the relaxed standard of inference from Defendants' market power, as articulate in *Angelico*, without first sufficiently establishing the geographic market.**[\*27]** (Doc. 45, p. 27). Specifically, Defendants' contend that, because the geographic market has not been sufficiently defined anticompetitive effects cannot be inferred based on WRMC's market power. Defendants also assert that Dr. McGary identified competitors from outside Dr. McGary's own proposed geographic market (i.e., Guthrie, Hershey, and Geisinger) during deposition.

Dr. McGary argues that Defendants took her deposition out of context with regard to competitors Guthrie, Hershey, and Geisinger. (Doc. 49, p. 23). Dr. McGary cites her testimony as follows:

Q: Was there anything else that leads you to conclude that the criteria were stringent?

A: They were all well above other criteria in like hospitals in the area.

Q: And what like hospitals do you have in mind when you say that?

A: Guthrie Clinic; the Poconos and even Hershey Medical Center.

(Doc. 49, p. 24 (citing McGary Deposition, p. 97)). Dr. McGary contends this testimony does not define competitors, as suggested by Defendants, but rather makes reference to privilege criteria at similar hospitals. (Doc. 49, p. 23).

Dr. McGary also relies on the testimony of Charles Santangelo, ("Santangelo"), the Chief Financial Officer of Susquehanna**[\*28]** Health, testifying as the corporate designee on behalf of WRMC. (Doc. 49, p. 24). Santangelo testified, in relevant part, that:

"we're not - - in this area, we're not attracting business because payers are sensitive to the prices. We're only attracting business because we're generally the only acute care hospital in this area. That's - - so that's what attracts patients to us in Lycoming County. So you don't need to create competitive pricing techniques."

(Doc. 49, p. 24 (citing Santangelo Deposition, p. 33)). Dr. McGary argues this testimony, *inter alia*, demonstrates WRMC's market power was so significant they did not have to implement competitive pricing to attract business.[[7]](#footnote-6)7 (Doc. 49, p. 25).

We agree with Dr. McGary. First, as stated previously, we find that Dr. McGary has alleged sufficient facts to render summary judgment on the parameters of the geographic market inappropriate at this juncture. Second, we agree with Dr. McGary that her testimony listing other hospitals for purposes of comparing credentialing criteria does not necessarily mean the listed hospitals are competitors for purposes of defining a geographic market. Finally, we agree the Santangelo testimony suggests**[\*29]** that WRMC did not have to "create competitive pricing techniques" due to their position as the only acute care facility in Lycoming County. Taken together, these findings, at minimum, create a genuine dispute as to WRMC's market power.

ELEMENT THREE: ILLEGAL CONCERTED ACTION

In *Weiss v. York Hospital*, the Third Circuit Court observed:

"[A]s to medical ability, restricting staff privileges to doctors who have achieved a specified level of medical ability falls within the scope of a hospital's "public service" function. . . . [I]t seems obvious that by restricting staff privileges to doctors who have achieved a predetermined level of medical competence, a hospital will enhance its reputation and the quality of the medical care that it delivers. Thus such action is pro-competitive and, therefore, permissible under the rule of reason. The analysis for professional conduct is basically identical. . . . One factor in the effective and efficient running of a hospital is a medical staff that can work together and be courteous to patients and staff. Doctors who have a history of trouble in interpersonal relations can legitimately be excluded because, if admitted, they will reduce the effectiveness**[\*30]** of the medical staff, thereby reducing the ability of the hospital to provide top-flight service. In sum, doctors who have trouble getting along with other people will reduce efficiency, thereby reducing the hospital's competitive position, and, therefore, exclusion of such doctors is pro-competitive and permissible under the rule of reason.

[*745 F.2d 786, 821, n.60 (3d Cir. 1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-V930-003B-G409-00000-00&context=) (citations omitted).

Defendants point out that it is undisputed that Dr. McGary did not meet the "100/100" criteria for surgical privileges at WRMC. (Doc. 45, p. 29). They argue that in seeking to maintain the quality of the medical services provided, its reputation, and its ability to compete in the marketplace, WRMC acted pro-competitively in denying Dr. McGary's application. *Id.* Defendants further argue that, at worst, they "did not relax the criteria because [Dr. McGary] was disruptive and effectively eviscerated the [cardiothoracic] surgery program during her prior tenure at WRMC." *Id.* Such a motivation, they argue, would also be pro-competitive, as Dr. McGary's presence could presumably compromise WRMC's ability to provide quality healthcare, thus undermining its ability to compete in the market. *Id.* (citing [*Weiss, 745 F.2d at 821 (1984)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-V930-003B-G409-00000-00&context=) ("doctors who have trouble getting**[\*31]** along with other people will reduce efficiency, thereby reducing the hospital's competitive position, and, therefore, exclusion of such doctors is pro-competitive and permissible under the rule of reason.")).

Dr. McGary argues that Defendants' actions were anti-competitive, and thus impermissible pursuant to a rule of reason analysis. (Doc. 49, p. 26). Specifically, Dr. McGary argues that Defendants' rejection of her application for privileges was illegally based upon so called "quality or collegiality concerns" because WRMC had access to eight (8) years of Dr. McGary's records demonstrating "excellent" quality in surgeries performed. (Doc. 49, p. 26). She avers she was able to perform "off pump" bypass surgeries as well as other surgeries that Dr. Osevala was not. (Doc. 49, pp. 26-27). She asserts that all deposed doctors attested to her competence as a surgeon, and that despite receiving complaints regarding the cardiothoracic surgery department generally during her tenure, Dr. Manchester did not receive a single complaint against Dr. McGary individually. (Doc. 49, p. 27). Dr. McGary suggests that Dr. Manchester holds a "personal grudge" against her ex-husband, and that this grudge**[\*32]** has tainted Dr. Manchester's testimony. (Doc. 49, p. 27). Further, Dr. McGary argues any quality or collegiality concerns are meant to be addressed by the Credentials Committee, not Dr. Manchester or any of the other individual Defendants. (Doc. 49, p. 28). While Dr. McGary admits Defendants had no obligation to provide staff privileges to her, Defendants were, she argues, obligated to follow the credentialing process pursuant to their own Medical Staff By-Laws. (Doc. 49, p. 28). That is, Defendants' failed to forward Dr. McGary's application to the Credentials Committee—a deviation from procedure that Dr. McGary argues was undertaken to protect the economic interests of Dr. Osevala and WRMC from the competition of Dr. McGary's proposed practice.

For this section, we must consider whether there are sufficient undisputed facts to conclude that the alleged concerted action would be legal. In order to do so, we must determine whether it is clear that denying Dr. McGary's application was pro-competitive. Although Defendants may have had pro-competitive reason to deny Dr. McGary's application, as they suggest, Dr. McGary has alleged sufficient facts to reasonably suggest Defendants' actions**[\*33]** could have been anticompetitive. Namely, Dr. Manchester's alleged grudge against Dr. McGary, Dr. McGary's purported excellent surgery record, and the disputed aberration from the Medical Staff By-Laws, taken as true, suggest that Defendants' actions could reasonably have been anti-competitive in nature. Thus, Defendants have not asserted sufficient undisputed facts on this element.

ELEMENT 4: ***ANTITRUST*** STANDING

***Antitrust*** injury "is a necessary but insufficient condition of ***antitrust*** standing." [*Hanover 3201 Realty, 806 F.3d at 171*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HC4-0FF1-F04K-K061-00000-00&context=) (quoting [*Barton & Pittinos, Inc. v. SmithKline Beecham Corp., 118 F.3d 178, 182 (3d Cir. 1997))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-F7G0-00B1-D069-00000-00&context=). As such, the parties opted to discuss the injury element through the lens of standing analysis. Recovery for an ***antitrust*** violation is limited to plaintiffs with ***antitrust*** standing. An inquiry quite apart from Article III standing, ***antitrust*** standing focuses on whether the plaintiff is the "proper plaintiff" to bring the action. [*Hanover 3201 Realty, LLC v. Vill. Supermarkets, Inc., 806 F.3d 162, 171 (3d Cir. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HC4-0FF1-F04K-K061-00000-00&context=) (citing [*Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 544, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5500-003B-S0SB-00000-00&context=). In analyzing ***antitrust*** standing, the court looks to factors derived from the Supreme Court's decision in *Associated General Contractors v. California State Council of Carpenters*:

(1) the causal connection between the ***antitrust*** violation and the harm to the plaintiff and the intent by the defendant to cause that harm, with neither factor alone**[\*34]** conferring standing; (2) whether the plaintiff's alleged injury is of the type for which the ***antitrust*** laws were intended to provide redress; (3) the directness of the injury, which addresses the concerns that liberal application of standing principles might produce speculative claims; (4) the existence of more direct victims of the alleged ***antitrust*** violations; and (5) the potential for duplicative recovery or complex apportionment of damages.

[*In re Modafinil* ***Antitrust*** *Litig., 837 F.3d 238, 263-64 (3d Cir. 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5KPB-X0R1-F04K-K26G-00000-00&context=) (quoting [*Ethypharm S.A. France v. Abbott Labs., 707 F.3d 223, 232-33 (3d Cir. 2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:57JY-TP61-F04K-K363-00000-00&context=) (citing [*Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 537-38, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5500-003B-S0SB-00000-00&context=).

To seek relief under ***antitrust*** laws, a plaintiff must show "injury of the type the ***antitrust*** laws were intended to prevent and that flows from that which makes defendants' acts unlawful. [*Mathews v. Lancaster Gen. Hosp., 87 F.3d 624, 641 (3d Cir. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-20F0-006F-M27R-00000-00&context=) (quoting [*Alberta Gas Chemicals Ltd. v. E.I. du Pont de Nemours and Co., 826 F.2d 1235, 1240 (3d Cir. 1987)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-81X0-001B-K4X2-00000-00&context=) (quoting [*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9KX0-003B-S48B-00000-00&context=). ***Antitrust*** laws are intended to "for the protection of competition not competitors." [*Race Tires Am., Inc. v. Hoosier Racing Tire Corp, 614 F.3d 57, 75-76 (3d Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:800W-G5B1-652R-100H-00000-00&context=) (quoting [*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9KX0-003B-S48B-00000-00&context=). Thus, a plaintiff is required to "prove that challenged conduct affected the prices, quantity or quality of goods or services," not just the plaintiff's own welfare. [*Mathews, 87 F.3d at 641*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-20F0-006F-M27R-00000-00&context=) (quoting [*Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 728 (3d Cir. 1991))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6R40-008H-V0Y4-00000-00&context=).

In order to determine whether Dr. McGary has provided sufficient evidence to defeat Defendants' Summary Judgment Motion with respect to the fourth element of her *Section 1* claim, we must determine whether, as a matter of law, Dr. McGary has standing as an ***anti-trust* [\*35]** plaintiff.

Defendants contend that Dr. McGary lacks standing as an ***antitrust*** plaintiff for two reasons. First, Defendants argue that Dr. McGary lacks standing because Dr. McGary has failed to demonstrate any price increase that resulted from the exclusion of Dr. McGary from the relevant market. Second, Defendants argue that Dr. McGary lacks standing because Dr. McGary is not currently a competitor in the relevant market. We begin our analysis with Defendants' second argument.

Defendants argue that Dr. McGary lacks ***antitrust*** standing because she is not a competitor in the market. The issue Defendants appear to raise is with the "directness of the injury" and the "existence of more direct victims" factors of the standing inquiry. In *Angelico v. Lehigh Valley Hospital*, the Third Circuit held that a cardiothoracic surgeon had standing to contest his exclusion from the market due to a group boycott. [*184 F.3d 268, 274-75 (3d Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WYP-XMR0-0038-X0JS-00000-00&context=); *see also* [*Brader v. Allegheny General Hospital, 64 F.3d 869, 877 (3d Cir. 1995)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-C6J0-001T-D03T-00000-00&context=). The court reasoned that the surgeon's injury was the "direct result of the alleged conspiracy," while the consumers suffered indirectly from the exclusion of the surgeon. [*Angelico, 184 F.3d at 275*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WYP-XMR0-0038-X0JS-00000-00&context=). Further, consumers would be unlikely to seek recovery for a reduction in competition resulting from hospitals**[\*36]** refusing to hire the surgeon. *Id.* Thus, the fact that Dr. McGary is not currently a competitor in the specialized cardiothoracic surgery services product market does not bar her ***antitrust*** claims as a matter of law.

Later cases have distinguished *Angelico* and held that a plaintiff lacks ***antitrust*** standing where he or she was only partially excluded from relevant geographic market. [*Bocobo v. Radiology Consultants of S. Jersey, P.A., 477 F. App'x 890, 897 (3d Cir. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55F1-VBF1-F04K-K01W-00000-00&context=). Thus, the issue of standing could also be impacted based on the cognizable geographic market, which has yet to be properly defined in this case.

We are similarly unconvinced by Defendants' argument that Dr. McGary's *Section 1* ***antitrust*** claim must fail as a matter of law because Dr. McGary failed to show any increase in prices resulting from her exclusion from the market. Although ***antitrust*** cases frequently emphasize price as a reliable metric to gauge the efficacy of competition, an effect on the "quantity or quality of goods or services" may also constitute an injury to competition. [*Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 728 (3d Cir. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-6R40-008H-V0Y4-00000-00&context=). For example, in *Mathews v. Lancaster General Hospital*, the court found a lack of ***antitrust*** injury where consumers were able to obtain the services provided by the excluded orthopedist from other doctors within the geographic market.**[\*37]** [*87 F.3d 624, 641 (3d Cir. 1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-20F0-006F-M27R-00000-00&context=).

In contrast to the plaintiff in [*Mathews*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-20F0-006F-M27R-00000-00&context=), Dr. McGary argues that competition was harmed because she is able to provide a quality of service not otherwise available at WRMC. (Doc. 49, p. 30). Specifically, Dr. McGary asserts that, unlike Dr. Osevala, she is able to perform heart bypass surgeries "off pump," thus reducing recovery time and lengths of stay for patients. *Id.* Considering that Dr. McGary's presence in this market could conceivably increase both the quality and quantity of cardiothoracic surgery services provided by WRMC, we find that a genuine issue of material fact exists as to whether the alleged reduced quality of service offered resulted in any injury to competition.

Although there remain genuine issues of material fact with respect to elements two, three, and four of Dr. McGary's *Section 1* claim, there is no genuine issue of fact that Dr. McGary failed to satisfy the first element of this claim. Therefore, we conclude Defendants' are entitled to summary judgment on Count 1 of Dr. McGary's Amended Complaint. Accordingly, I recommend that Summary Judgment be GRANTED with respect to Dr. McGary's *Section 1* Sherman Act Claim.

B. *SECTION 2 OF THE SHERMAN ACT*

*Section 2* of the Sherman Act states: "Every person who shall monopolize,**[\*38]** or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of [***antitrust*** violations]." *15 U.S.C. § 2*.

Dr. McGary asserts three separate claims under *Section 2* of the Sherman Act. First, she alleges that Defendants maintained an illegal monopoly on cardiothoracic surgical treatment in the relevant geographic market. Second, Dr. McGary alleges that Defendants attempted to acquire or maintain an illegal monopoly in the relevant geographic market. Third, Dr. McGary alleges that Defendants conspired to create an illegal monopoly in the relevant geographic market.

For the reasons provided below, we recommend that Dr. McGary's illegal monopoly and unlawful intent to monopolize claims under *Section 2* be allowed to proceed, and that Defendants' Motion for Summary Judgment be GRANTED with respect to Dr. McGary's claim of conspiracy to create an illegal monopoly under *Section 2*.

1. THE ILLEGAL MONOPOLY CLAIM.

To prove an illegal monopoly under *Section 2* of the Sherman Act, a plaintiff must show:

(1) the possession of monopoly power in the relevant market, and

(2) the willful acquisition or maintenance of**[\*39]** that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

[*Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 307 (3d Cir. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4PKD-KMP0-TXFX-52CY-00000-00&context=) (quoting [*United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-G490-003B-S2W3-00000-00&context=). Monopoly power, as used here, is "the ability to control prices and exclude competition in a given market." [*Broadcom, 501 F.3d at 307*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4PKD-KMP0-TXFX-52CY-00000-00&context=) (citing [*Grinnell, 384 U.S. at 571(1966))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-G490-003B-S2W3-00000-00&context=). "If a firm can profitably raise prices without causing competing firms to expand output and drive down prices, that firm has monopoly power." [*Broadcom, 501 F.3d at 307 (2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4PKD-KMP0-TXFX-52CY-00000-00&context=) (citing [*Harrison Aire, Inc. v. Aerostar Int'l, Inc., 423 F.3d 374, 380 (3d Cir. 2005))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4H47-1F20-0038-X4B5-00000-00&context=).

ELEMENT ONE: POSSESSION OF THE MONOPOLY POWER IN THE RELEVANT MARKET

In order to address this first element of Dr. McGary's illegal monopoly claim, the court must consider both the purported parameters of the geographic market at issue and the possession of monopoly power within that market. As above, Defendants contend the geographic area presented by Dr. McGary, by way of Dr. Eisenstadt's report, (Doc. 42-11), is legally deficient, but, notably, they fail to present conflicting expert testimony.

For the reasons stated above, the court finds there is a genuine issue of material fact regarding Dr. McGary's proposed geographic market such that the court cannot resolve this issue as a matter of law.

ELEMENT TWO: WILFUL ACQUISITION OF MAINTENANCE OF A MONOPOLY

In order to satisfy**[\*40]** the second element of Dr. McGary's illegal monopoly claim, willful acquisition and maintenance of monopoly power, a plaintiff must demonstrate some anticompetitive conduct on the part of the possessor of the monopoly power. As stated by the Court in [*Broadcom, 501 F.3d at 308*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4PKD-KMP0-TXFX-52CY-00000-00&context=):

Anticompetitive conduct may take a variety of forms, but it is generally defined as conduct to obtain or maintain monopoly power as a result of competition on some basis other than the merits. Conduct that impairs the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way may be deemed anticompetitive. [*Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 604-05, 105 S. Ct. 2847, 86 L. Ed. 2d 467 & n. 32 (1985))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B390-0039-N4JD-00000-00&context=). "Conduct that merely harms competitors, however, while not harming the competitive process itself, is not anticompetitive." *See* [*Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-XDD0-003B-R3PV-00000-00&context=).

Defendants contend there is no evidence to suggest that WRMC either acted to acquire a monopoly in cardiothoracic surgical services, or purchased or consolidated the commercial entities at issue. (Doc. 45, p. 48). Defendants argue that "willfully acquiring or maintaining monopoly power is 'distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident'" and that WRMC's position as the**[\*41]** only cardiothoracic surgery program in Lycoming County is an example of such a historic accident. (Doc. 45, p. 47-48) (quoting [*United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-G490-003B-S2W3-00000-00&context=).

Dr. McGary argues that as the only acute care hospital in the area, WRMC has maintained a monopoly by relying on "onerous and outdated surgical number standards as a pretextual reason for denying surgical privileges." (Doc. 49, p. 39). Dr. McGary also challenges Defendants' assertion that she provided crucial input in developing and implementing the standards at issue. *Id.* Indeed, she contends Dr. Osevala was unable to meet these standards himself. (Doc. 48, ¶ 60). Essentially, Dr. McGary argues that WRMC was able to protect its market share by denying privileges to surgeons without consideration of the credentialing committee, thus making it nearly impossible for an independent surgeon to practice in Lycoming County.

Taking as true Defendants' assertion that WRMC's position is indeed a "historic accident," this fact alone does not demonstrate WRMC was not willfully acquiring and maintaining monopoly power. The issue is whether, given WRMC's position as the only acute care facility in the area, WRMC engaged in anticompetitive conduct. We are persuaded that**[\*42]** Dr. McGary has alleged sufficient material facts to, at minimum, create legitimate questions as to whether WRMC's criteria were onerous and whether WRMC applied the criteria so as to exclude local independent surgeons like Dr. McGary from the cardiothoracic surgery market.

2. THE UNLAWFUL ATTEMPT TO MONOPOLIZE CLAIM

To show an unlawful attempt to monopolize under *Section 2* of the Sherman Act, a plaintiff must prove that the defendants:

(1) had a specific intent to monopolize the relevant market;

(2) engaged in conduct to implement the specific intent; and

(3) that there was a dangerous probability of success.

[*Friedman v. Delaware County Memorial Hospital, 672 F.Supp. 171, 195 (E.D. Pa. 1987)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-BJT0-003B-618J-00000-00&context=) (citing [*Swift, et al. v. United States, 196 U.S. 375, 25 S. Ct. 276, 49 L. Ed. 518 (1905))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BP30-003B-H3KK-00000-00&context=).

In support of their Motion, Defendants argue that they are entitled to summary judgment because Dr. McGary cannot prove the first or second elements of her unlawful attempt to monopolize claim.[[8]](#footnote-7)8

ELEMENT ONE: SPECIFIC INTENT TO MONOPOLIZE IN RELEVANT MARKET

We previously addressed in this report that there are insufficient undisputed facts to determine the relevant geographic market in this case. *See Sections IV(A)(2) and IV(B)(1) herein*. For the same reasons, we find that there is a genuine dispute of material fact which prevents us from finding in Defendants' favor with respect to relevant**[\*43]** geographic market in the Unlawful Attempt to Monopolize claims. For the sake of completeness, we will also evaluate whether there are undisputed material facts sufficient to conclude that Defendants' had specific intent to monopolize the cardiothoracic surgical services market.

Defendants assert two theories to refute Dr. McGary's allegation that they intended to monopolize the relevant cardiothoracic surgical services market. First, they argue that the use of credentialing criteria alone is not evidence of specific intent to monopolize. (Doc. 45, p. 46). Second, they argue that by denying Dr. McGary's application for privileges, Defendants created, rather than reduced, competition in the relevant services and geographic markets. *Id.*

With respect to their first argument, we find that use of credentialing criteria neither supports nor negates an actor's specific intent to monopolize. Instead, it is incumbent upon the court to consider whether, based on the specific facts before us, the application of the credentialing criteria in this case suggest any plausible intent to monopolize. Here, the facts are clear that WRMC is the only acute care facility in Lycoming County. Therefore, the**[\*44]** court must look with greater scrutiny at the application and effect of the credentialing criteria in making a determination of intent. Considering the lack of competing hospitals in the area, Dr. McGary's alleged inability to travel beyond the Williamsport area without compromising the quality of patient care, and Dr. McGary's aforementioned allegations regarding WRMC's coercive application of credentialing criteria, we find there is a genuine issue of fact as to whether WRMC lacked specific intent to monopolize.

With respect to their second argument, Defendants rely on *Pontius v. Children's Hospital* to support their position that a hospital's decision to deny a practitioner's application for treatment privileges is strong evidence of intent not to monopolize. (Doc. 45, p. 46) ("[The denial of a plaintiff's application] is strong evidence of an intent *not* to monopolize, since the last thing [a] monopolist hospital should want is an able practitioner looking for a new home in which to conduct their specialty." [*Pontius v. Children's Hospital, 552 F.Supp. 1352, 1377 (W.D. Pa. 1982)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-7920-0039-S0D0-00000-00&context=) (emphasis added)). Specifically, Defendants claim that, as in *Pontius*, by denying Dr. McGary's application for treatment privileges, they left Dr. McGary free to compete with**[\*45]** them. (Doc. 45, p. 46).

Dr. McGary disagrees with Defendants' position that, by denying her application for treatment privileges, Defendants fostered competition in the relevant geographic market for two reasons. (Doc. 49, p. 38). First, Dr. McGary was unwilling to travel away from Williamsport to treat patients because she felt her ability to provide the highest level of care would be compromised. (Doc. 49, p. 38). Second, testimony from Mr. Santangelo indicates that there are no hospitals comparable to WRMC in Lycoming County. (Doc. 49, p. 38). That is, WRMC already existed in a "quasi-monopolistic" state and felt no pressure to grant Dr. McGary's application for privileges. (Doc. 49, p. 38). She argues that *Pontius* is distinguishable from this case because it took place in the Pittsburgh area, which is saturated with hospitals. (Doc. 49, p. 38-39). Unlike the hospitals at issue in those cases, there is no hospital close enough to WRMC at which Dr. McGary could attain privileges and directly compete with WRMC. (Doc. 49, p. 39).

The court agrees with Dr. McGary. Defendants' comparison of the instant case and the facts in [*Pontius*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-7920-0039-S0D0-00000-00&context=) is misplaced. While a hospital with monopolistic intent**[\*46]** may very well seek to grant privileges to any doctor who may present direct competition, such a strategy would be undermined if there was no other hospital at which a competing doctor could offer services, as here. Thus, there remain insufficient undisputed facts for the court to make a determination regarding specific intent at the summary judgment stage.

ELEMENT TWO: ENGAGE IN CONDUCT TO IMPLEMENT A SPECIFIC INTENT TO MONOPOLIZE

Defendants briefly address the issue of conduct undertaken to implement specific intent, attributing WRMC's position as the only cardiothoracic surgery program in Lycoming County to a "historic accident." (Doc. 45, p. 48). Specifically, WRMC did not purchase or consolidate any other entities that provide cardiothoracic surgery entities, and the cardiothoracic surgery program has remained largely unchanged since its development in the early 1990's. *Id.* Finally, Defendants allege that seven (7) cardiothoracic surgeons have met the criteria and have been awarded privileges at WRMC since 2007, thus belying Dr. McGary's claim that the criteria are onerous.[[9]](#footnote-8)9 *Id.*

Dr. McGary does not dispute that WRMC is the only acute care facility in the area and does not claim that**[\*47]** WRMC tried to purchase or consolidate any other cardiothoracic surgery facilities. (Doc. 49, p. 39). Rather, Dr. McGary argues that WRMC's position as the only acute care facility in the area allows it to maintain a monopoly by relying on unduly onerous surgical standards as a pretext for denying surgical privileges. (Doc. 49, p. 39). She argues that not only did she not have any input in establishing the criteria, but also that Dr. Osevala—the only cardiothoracic surgeon practicing at WRMC—was unable to meet the standards applied to her application for treatment privileges. (Doc. 49, pp. 39-40). Further, Dr. McGary asserts that the seven (7) CT surgeons who met the criteria, as cited by Defendants, were actually *locum tenens*, and were not subject to the same application process and selection criteria as Dr. McGary.[[10]](#footnote-9)10 (Doc. 49, p. 40). It was through the process of denying privilege applications without the input of the Credentials Committee that WRMC maintained their monopoly over the cardiothoracic surgery market. *Id.*

Given that both parties acknowledge WRMC as the only acute care facility in the area, the question of conduct to implement specific intent is one of whether WRMC's is**[\*48]** impermissibly engaging in conduct to maintain that position. Taken as true, WRMC's application of particularly onerous surgical standards as a means to prevent Dr. McGary from competing in CT surgery demonstrates there remain disputed material facts on the issue of intent and the corresponding to conduct used to implement this alleged intent.

3. THE CLAIM OF CONSPIRACY TO MONOPOLIZE UNDER *SECTION 2* OF THE SHERMAN ACT

To prove a conspiracy to monopolize under *Section 2*, a plaintiff must show these three elements:

(1) an agreement or understanding between two or more economic entities;

(2) a specific intent to monopolize; and

(3) the commission of an overt act in furtherance of the alleged conspiracy.

[*Friedman v. Delaware County Memorial Hospital, 672 F. Supp. 171, 195 (E.D. Pa. 1987)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-BJT0-003B-618J-00000-00&context=) (citing [*Continental Ore Co. v. Union Carbide of Carbon Corp., 370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1902))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H8B0-003B-S01X-00000-00&context=). In support of their Motion Defendants argue that they are entitled to summary judgment because Dr. McGary cannot prove the first element of her conspiracy to monopolize claim.[[11]](#footnote-10)11

ELEMENT ONE: AGREEMENT OR UNDERSTANDING BETWEEN TWO OR MORE ECONOMIC ENTITIES

As delineated above, the first "essential element" of a conspiracy to monopolize claim requires action by two distinct economic entities. Citing *Friedman*, Defendants argue that "because unilateral action was fatal to [Dr. McGary's] *Section 1* claims, it was also fatal to [Dr. McGary's] conspiracy to monopolize**[\*49]** claim under *Section 2*." (Doc. 45, p. 49) (citing [*Friedman, 672 F.Supp. at 196 (1987))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-BJT0-003B-618J-00000-00&context=). Due to this purported fatal flaw, Defendant does not analyze the subsequent two elements of conspiracy to monopolize.

Dr. McGary does not dispute the elements for conspiracy articulated by Defendants. (Doc. 49, p. 41). Rather, she claims that Dr. Osevala's action on behalf of his own economic interests, when considered in conjunction with "the corporate entities of the other doctor Defendants," establishes the first element under *Section 2*. (Doc. 49, p. 41).

Given that we have already found that Dr. McGary fails to demonstrate the "concerted action" element of her *Section 1* claim, it follows that, for the reasons provided in that section above, Dr. McGary also fails to demonstrate an agreement or understanding between two or more distinct economic entities. Thus, her claim for conspiring to monopolize must fail.

C. STATE LAW CLAIMS

Dr. McGary has asserted three (3) state law claims against Defendants: breach of third party beneficiary agreement (Count IV); interference with prospective contractual relationships (Count V); and conspiracy in restraint of trade (Count VI). As each of these claims sound in contract, Dr. McGary must, at minimum, demonstrate either she**[\*50]** was prevented from entering into a contract as a result of the denial of her application for privileges, or that she was a third-party beneficiary of the medical staff bylaws. I will address each count separately.

1. BREACH OF THIRD PARTY BENEFICIARY AGREEMENT

The Pennsylvania Supreme Court explained in *Spires v. Hanover Fire Ins. Co.* that:

To be a third-party beneficiary entitled to recover on a contract it is not enough that it be intended by one of the parties to the contract and the third person that the latter should be a beneficiary but both parties to the contract must so intend and must indicate that intention in the contract; . . . obligation to the third party must be created, and must affirmatively appear, in the contract itself . . . [t]he fact, therefore, that plaintiffs would be incidentally benefitted would not give them a right to recover on the policy. . . . (emphasis added).

[*364 Pa. 52, 70 A.2d 828, 830-31 (Pa. 1950)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-VRB0-003C-M0PT-00000-00&context=).

Defendants contend that Count IV fails because Dr. McGary "does not have an enforceable contractual right under the medical staff by-laws." (Doc. 45, p. 50). Defendants argue that, to the extent the By-Laws grant any contractual rights whatsoever, those contractual rights would only be enjoyed between**[\*51]** active medical staff and the hospital—not between potential applicants and the hospital. *Id.* Relying on *Robinson v. Magovern*, Defendants add that "no Pennsylvania Court has held that an applicant for medical staff privileges is an intended third-party beneficiary of the staff by-laws of a private hospital." [*521 F. Supp. 842, 925 (W.D. Pa. 1981)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-MKY0-0039-S03V-00000-00&context=).

Dr. McGary argues that, as an applicant for privileges, she relied on the medical staff By-Laws, and therefore is an intended third-party beneficiary. (Doc. 49, p. 50). She also quotes from *Robinson* that "intent to create rights in favor of a third-party beneficiary clearly can be inferred from the language of the contract taken as a while in light of the accompanying circumstances, the fact that the parties did not expressly create rights in favor of a third-party beneficiary is not determinative." [*521 F. Supp. at 925 (1981)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-MKY0-0039-S03V-00000-00&context=). She then turns specifically to the preamble of the By-Laws, which state: "[t]hese By-Laws create a system of mutual rights and obligations among the Hospital(s), members, and other practitioners." (Doc. 49, p. 42 (quoting Bylaws of the Medical Staff of Susquehanna Health, p. 1)). Further, the By-Laws state: "[t]he initial appointment application form shall also include the following**[\*52]** items and bind the applicant to each by virtue of his signature on the application . . . including the time the application is under consideration."

According to the Defendants, the By-Laws do not create a third party beneficiary relationship. (Doc. 45, p. 50). To support that contention, they cite [*Robinson, 521 F. Supp. at 842*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-MKY0-0039-S03V-00000-00&context=), a case in which a thoracic surgeon was denied privileges at a Pittsburgh hospital and sued for both ***antitrust*** and breach of contract claims. [*Id. at 50-51*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9CH0-003B-S1JP-00000-00&context=). Discussing the breach of contract — third party beneficiary claim, the court said:

The text of Allegheny General's Medical Staff Bylaws does not contain any language that explicitly states the intention of the parties to confer rights on an applicant for staff privileges. We recognize, of course, that if the intent to create rights in favor of a third-party beneficiary clearly can be inferred from the language of the contract taken as a whole in light of the accompanying circumstances, the fact that the parties did not expressly create rights in favor of a third-party beneficiary is not determinative. See [*Matter of Gebco Investment Corp., 641 F.2d 143, 147 (3d Cir. 1981)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-53D0-0039-W1DH-00000-00&context=); [*Logan v. Glass, 136 Pa.Super. 221, 225-26, 7 A.2d 116, 118 (1939)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W6S-TGP0-00KR-C561-00000-00&context=), aff'd mem., [*338 Pa. 489, 14 A.2d 306 (1940)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-W880-003C-M44V-00000-00&context=). Taking the language of the bylaws as a whole, however, we cannot clearly infer the intent to confer rights on applicants for staff**[\*53]** privileges. Article III of the bylaws focuses on [*\*926*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-MKY0-0039-S03V-00000-00&context=) the prerequisites for obtaining staff privileges and on the division of labor within the hospital superstructure for processing applications rather than on the duties that the hospital owes to applicants. No Pennsylvania decision has recognized an applicant for staff privileges as a third-party beneficiary of the medical staff bylaws of a private hospital. We find that Allegheny General's medical staff and Board of Trustees did not intend to confer any rights on applicants for staff privileges when they adopted the Medical Staff Bylaws, and that the text of the bylaws does not reflect an intention of the parties to impose duties on the hospital for the benefit of such applicants. Therefore, we hold that the plaintiff's claim lacks a legal foundation.

[*Robinson, 521 F. Supp. at 925-26*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-MKY0-0039-S03V-00000-00&context=).

The *Robinson* Court does not cite the actual language of the By-Laws. Here, McGary has cited language showing that she was bound by the By-Laws, thus creating a third party beneficiary contractual relationship between Dr. McGary and the hospital.[[12]](#footnote-11)12 (Doc. 49, p. 43). Specifically,

The initial appointment application form shall also include the following items and bind the applicant to each**[\*54]** by virtue of his signature on the application:

(2) A statement that the applicant has been provided with a copy of the Medical Staff Bylaws, the Medical Staff Rules and ***Regulations***, his Department's bylaws, and the Hospital(s) Corporate Bylaws and agrees to be bound by their terms **including the time the application is under consideration**.

. . . .

The completed application form shall be submitted to the Medical Director's Office along with any application fee. Upon receipt of the application, the Medical Director shall notify the CEO of Susquehanna Health and the President of the Medical Staff. A summary of the application information shall be transmitted to the Credentials Committee and the Chairman of each department in which the applicant seeks clinical privileges.

*Id.* (quoting Bylaws of The Medical Staff of Susquehanna Health, p. 17) (emphasis added).

Furthermore, in *Robinson* the court found that the hospital in that case followed the by-laws.

Even if our legal analysis is incorrect [*regarding the third party beneficiary analysis*], however, we find that the plaintiff has no factual basis for his claim. While processing Dr. Robinson's application, Allegheny General fully complied with**[\*55]** all substantive provisions of the bylaws. Dr. Robinson had ample opportunity to present Allegheny General with information in support of his application. We believe that the hospital gave fair and full consideration to the plaintiff's request for staff privileges.

[*521 F. Supp. at 926*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-MKY0-0039-S03V-00000-00&context=).

The instant case is distinguishable from [*Robinson*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-MKY0-0039-S03V-00000-00&context=) because the hospital here did not follow the procedure set forth in the by-laws. Dr. McGary points out that Dr. Manchester unilaterally denied her application rather than forwarding it to the Credentials Committee for review. (Doc. 49, pp. 44-45). The 100/100 criterion apparently relied upon by the hospital is, according to Dr. McGary, an artificial barrier and a pretext for her denial. This is a question of fact to be resolved by the jury.

Accordingly, it is recommended that Defendants' Motion for Summary Judgment be denied with respect to Count IV, Breach of Third Party Beneficiary Agreement, of Dr. McGary's Amended Complaint.

2. INTERFERENCE WITH PROSPECTIVE CONTRACTS

In order to properly prove a claim for intentional interference with prospective contractual relations, a plaintiff must satisfy four elements: "(1) a prospective contractual relation; (2) the purpose or intent**[\*56]** to harm the plaintiff by preventing the relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual damage resulting from the defendant's conduct." [*Thompson Coal Co. v. Pike Coal Co., 488 Pa. 198, 412 A.2d 466, 471 (Pa. 1979)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRJ-1PK0-0054-F341-00000-00&context=) (citing [*Glenn v. Point Park Coll., 441 Pa. 474, 272 A.2d 895, 898 (Pa. 1971))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-T790-003C-M21G-00000-00&context=). *Also see* [*Rantnetwork, Inc. v. Underwood, 11-cv-1283, 2012 U.S. Dist. LEXIS 40693, 2012 WL 1021326, \*15 (M.D. Pa. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:558G-THY1-F04F-40T8-00000-00&context=).

First, Defendants allege that there were no contracts that could have been damaged by their conduct because Dr. McGary did not start a cardiothoracic surgery practice. (Doc. 45, p. 52). That is, any contract between Dr. McGary and a potential client is "100% hypothetical." *Id.* Because there are no contracts, Dr. McGary cannot prove specific relationships between herself and third parties that were impeded by Defendants' conduct, or that Defendants acted solely to prevent those relationships from arising. (Doc. 45, p. 52). Thus, there is no evidence that any defendant acted with intent to impede Plaintiff's treatment of any specific patient, and this claim must fail as a matter of law.

I find this argument unavailing. By its very nature, "prospective contractual relation" is necessarily hypothetical. That is, it is unrealistic to contend the Dr. McGary would not enter into contractual relations with patients**[\*57]** if she were permitted to practice cardiothoracic surgery at WRMC.

Defendants also argue that even if they did act with intent to interfere with prospective contractual relations, their actions were justified. (Doc. 45, p. 52). In support of this contention, Defendants quote the Pennsylvania Supreme Court: "absence of privilege or justification in the tort [of intentional interference with prospective contractual relations] is closely related to the element of intent." [*Rantnetwork, 2012 U.S. Dist. LEXIS 40693, 2012 WL 1021326 at \*15 (2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:558G-THY1-F04F-40T8-00000-00&context=) (quoting [*Glenn v. Point Park College, 441 Pa. 474, 272 A.2d 895, 899 (Pa. 1971))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRM-T790-003C-M21G-00000-00&context=). They assert, similar to above, that Dr. McGary has failed to establish that in denying her application Defendants had any motivation other than maintaining the quality of the WRMC cardiothoracic surgery program. (Doc. 45, p. 52).

I must again disagree with the Defendants. As discussed previously, Dr. McGary has presented sufficient material facts to suggest that her denial of privileges based on the credentialing criteria was a pretextual barrier to prevent her from practicing her chosen profession in Lycoming County. I do not find that the criteria were in fact a pretext, only that it is a disputed issued of material facts. It is for these reasons that I recommend the court**[\*58]** deny summary judgment on this claim.

3. CIVIL CONSPIRACY "IN RESTRAINT OF TRADE"

The three essential elements of a state law claim for conspiracy in restraint of trade are: "(1) a combination or agreement between two or more persons or business entities to commit an unlawful act or to accomplish a lawful objective through unlawful means; (2) an intent to injure the plaintiff; and (3) an absence of justification for the defendants' agreement in restraint of trade." [*Robinson v. Magovern, 521 F.Supp. 842, 926 (W.D. Pa. 1981)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4N-MKY0-0039-S03V-00000-00&context=). Dr. McGary bears the burden of proving "two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means." *Id.* (citing [*Kohn v. Sch. Dist., 2012 U.S. Dist. LEXIS 63751, 2012 WL 1598096, \*3 (M.D. Pa. May 7, 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55KF-F3R1-F04F-41XY-00000-00&context=) (quoting [*Thompson, 488 Pa. at 211*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RRJ-1PK0-0054-F341-00000-00&context=))). Further, "[a] single entity cannot conspire with itself and, similarly, agents of a single entity cannot conspire among themselves." (Doc. 45, p. 53) (citing [*Rutherford v. Presbyterian-University Hospital, 417 Pa. Super. 316, 612 A.2d 500, 508 (Pa. Super. Ct. 1992))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S3J-YR20-003C-S01J-00000-00&context=). Given that Defendants are members of a single entity, they cannot, as a matter of law, conspire together. (Doc. 45, p. 53).

Even assuming that Dr. McGary seeks to recover under common law conspiracy, she fails to meet her initial burden of demonstrating two entities capable of conspiring with each other. Thus, for the same reasons discussed above regarding Plaintiff's Sherman Act**[\*59]** *Section 1* claim, Dr. McGary's claim for civil conspiracy in restraint of trade must fail.

VI. CONCLUSION

For the reasons stated herein, **IT IS RECOMMENDED THAT** the Court **GRANT IN PART and DENY IN PART** Defendants' Motion for Summary Judgment. The Court should:

1. GRANT Defendants' Motion for Summary Judgment with respect to Dr. McGary's claim under *Section 1* of the Sherman Act (Count 2);

2. DENY Defendants' Motion for Summary Judgment with respect to Dr. McGary's claim of Illegal Monopoly under *Section 2* of the Sherman Act (Count 2);

3. DENY Defendants' Motion for Summary Judgment with respect to Dr. McGary's claim of Unlawful Attempt to Monopolize under *Section 2* of the Sherman Act (Count 2);

4. GRANT Defendants' Motion for Summary Judgment with respect to Dr. McGary's claim of Conspiracy to Monopolize under *Section 2* of the Sherman Act (Count 2);

5. DENY Defendants' Motion for Summary Judgment with respect to Dr. McGary's State law claim of Breach of Third Party Beneficiary Agreement (Count 4);

6. DENY Defendants' Motion for Summary Judgment with respect to Dr. McGary's State law claim of Interference with Prospective Contractual Relationships (Count 5);

7. GRANT Defendants' Motion for Summary Judgment with respect to Dr. McGary's State**[\*60]** law claim of Conspiracy in Restraint of Trade (Count 6).

**The parties are further placed on notice** that pursuant to [*Local Rule 72.3*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5SWT-GK70-01Y5-V553-00000-00&context=):

Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in *28 U.S.C. § 636 (b)(1)(B)* or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in [*Local Rule 72.2*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5SWT-GK70-01Y5-V552-00000-00&context=) shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own**[\*61]** determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Failure to file timely Objections to the foregoing Report and Recommendation may constitute a waiver of any appellate rights.

Date: January 22, 2018

BY THE COURT

*/s/ William I. Arbuckle*

William I. Arbuckle

U.S. Magistrate Judge

**End of Document**

1. 1Defendants assert that WRMC is a fictitious name referring to the Williamsport Hospital. (Doc. 42, ¶5). Because there is no dispute that WRMC and Williamsport Hospital are the same entity we refer to the Williamsport Hospital as WRMC throughout this opinion. [↑](#footnote-ref-0)
2. 2History of competition law, https://en.wikipedia.org/wiki/History\_of\_competition\_law (last visited Jan. 16, 2018). [↑](#footnote-ref-1)
3. 3HS's former name is Susquehanna Regional Healthcare Alliance. It changed its name to Susquehanna Health System on March 24, 2008. (Doc. 48, ¶ 2). [↑](#footnote-ref-2)
4. 4Defendants assert that SPS is sometimes referred to by its fictitious name, Susquehanna Health Medical Group. (Doc. 48, ¶ 8). [↑](#footnote-ref-3)
5. 5The Sherman Act distinguishes between concerted action that restrains trade, as addressed in ***Section 1*** ("***Section 1***"), and independent action that monopolizes or threatens to monopolize, as addressed in ***Section 2*** ("***Section 2***"). *See* [*Am. Needle, Inc. v. NFL, 560 U.S. 183, 195, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7YJ2-MVT1-2RHS-K0NF-00000-00&context=). In Count Two of her Amended Complaint (Doc. 10), Dr. McGary alleges violations of both ***Section 1*** and ***Section 2*** of the Sherman Act. To provide a clear analysis of the claims alleged we have addressed the ***Section 1*** and ***Section 2*** claims separately. [↑](#footnote-ref-4)
6. 6There is no dispute that, during the relevant period, Dr. Osevala was a cardiothoracic surgeon employed by an arm of SHS. In fact, in their Answer to Dr. McGary's Amended Complaint, Defendants admit that Dr. Osevala is the *only* cardiothoracic surgeon with treatment privileges at WRMC. (Doc. 24, ¶ 7). Therefore it is plausible that Dr. Osevala would be unable to maintain his current volume of patients should another provider be granted treatment privileges in this field. Moreover, Dr. Osevala's compensation agreement included the potential for incentive compensation based on the financial performance of his practice. (Doc. 49, p. 21; Doc. 42-6, p. 16-17). Thus, in addition to the potential financial loss that could be suffered due to reduced patient volume, Dr. Osevala may be awarded less incentive compensation should another cardiothoracic surgeon be given treatment privileges at WRMC. Although Defendants' attempt to rebut Dr. McGary's position by pointing out that Dr. Osevala has never received incentive compensation, we are not persuaded. Regardless of whether it has been realized in the past, Dr. Osevala still has a present and future interest in securing incentive compensation. [↑](#footnote-ref-5)
7. 7*Also see* Santangelo's Deposition at 46 ("Q: Are you aware — and I guess it would be from approximately 2009, say, to 2013 — of Williamsport Regional Medical Center being excluded from any third-party payer? A: No. No one would exclude us because we're the only acute care hospital in Lycoming County."). [↑](#footnote-ref-6)
8. 8With respect to the third element of Dr. McGary's unlawful attempt to monopolize claim, neither party specifically addresses it in their briefs. Given our findings in the previous two sections, we do not need to reach a conclusion regarding Dr. McGary's probability of success. [↑](#footnote-ref-7)
9. 9Defendants do not cite to the record, or otherwise provide factual support, for this contention. [↑](#footnote-ref-8)
10. 10Similarly, Dr. McGary does not cite to the record, or otherwise provide factual support, for this contention. [↑](#footnote-ref-9)
11. 11With respect to the second and third elements of Dr. McGary's conspiracy to monopolize claim, neither party specifically addresses it in their briefs. Given our findings with respect to the first element of this claim, we do not need to reach a conclusion regarding the second or third elements. [↑](#footnote-ref-10)
12. 12As we read the By-Laws, the language makes Dr. McGary a party to the contract, not just a third party beneficiary. Either way, she is entitled to the benefits of the bargain. [↑](#footnote-ref-11)