

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33309

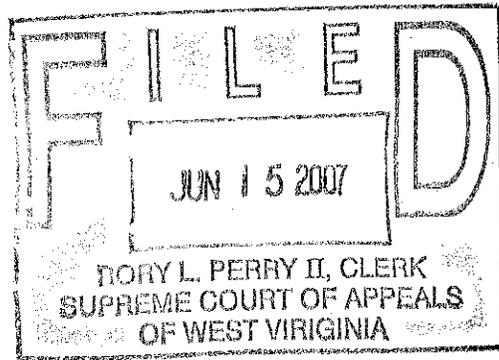
HIGHMARK WEST VIRGINIA, INC. d/b/a
MOUNTAIN STATE BLUE CROSS BLUE SHIELD,
a West Virginia Corporation,

Appellee,

v.

SHAROOZ S. JAMIE, M.D.,

Appellant.



BRIEF OF APPELLANT, SHAROOZ S. JAMIE, M.D.

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Sharooz S. Jamie, M.D. (hereinafter "Dr. Jamie") respectfully submits this Brief in support of his appeal of the final order of the Circuit Court of Wood County, dated September 1, 2006, entering judgment in favor of Highmark West Virginia, Inc. d/b/a Mountain State Blue Cross Blue Shield (hereinafter "Mountain State") on Dr. Jamie's nine-count counterclaim, which was thereby dismissed with prejudice.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

Mountain State filed suit against Dr. Jamie on December 22, 2004 for claims sounding in breach of contract and unjust enrichment based on alleged billing improprieties. Additionally, Mountain State made a claim for specific performance/injunctive relief based on Dr. Jamie's alleged refusal to allow it to inspect or audit his records. On or about January 12, 2005, Dr. Jamie filed a Second Amended Counterclaim (hereinafter "counterclaim") alleging ten causes of action relating to Mountain State's breach of contractual obligations, misconduct regarding business and payment procedures, and misconduct during an office audit. Specifically, after voluntarily withdrawing the tenth count, Dr. Jamie's counterclaim against Mountain State alleges causes of action for: (1) breach of contract; (2) violation of W. Va. Code § 33-45-2, regarding retroactive denial of insurance claims; (3) breach of the covenant of good faith and fair dealing; (4) fraud, for wrongful failure to pay reimbursements; (5) fraud, for failing to provide full reimbursements; (6) fraud, for applying deductibles to Dr. Jamie's patients in excess of what was provided by contract; (7) fraud, for charging Dr. Jamie's patients co-pays in excess of what was provided by contract, thereby wrongfully withholding full reimbursements to Dr. Jamie; (8) negligence in processing delayed and erroneous payments; and (9) slander, for an accusation of wrongdoing on the part of Dr. Jamie made to his employees by Mountain State's representative.

Notwithstanding that all nine causes of action alleged in the counterclaim set forth a short and plain statement of each claim, which included every essential legal element (with the requisite particularity, where applicable), the circuit court, Honorable George W. Hill, Jr. presiding, dismissed the counterclaim in its entirety pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. Judge Hill granted Mountain State's motion to dismiss from the bench without even having read Dr. Jamie's response in opposition. Further, instead of accepting as true the allegations of Dr. Jamie's counterclaim, as it was bound to do, the court did exactly the opposite: it accepted as true the allegations asserted in Mountain State's motion to dismiss, including the assertion that Dr. Jamie perpetuated fraud against Mountain State, a claim Dr. Jamie vigorously denies.

The circuit court entered its dismissal order on February 27, 2006. On March 8, 2006, Dr. Jamie timely filed a motion to alter or amend that order pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure. Following Judge Hill's retirement from the bench, that motion was heard before Special Judge Arthur N. Gustke on July 28, 2006, and ultimately denied by the court's Order of August 15, 2006. By its Order of September 1, 2006, the circuit court entered final judgment for Mountain State on the counterclaim in accordance with Rule 54(b) of the West Virginia Rules of Civil Procedure. Dr. Jamie petitioned for an appeal of this order, which petition was granted by this Court on February 13, 2007. This brief is timely filed within thirty (30) days of Appellant's receipt of this Court's Order establishing a briefing schedule.

STATEMENT OF FACTS

In October 1991, Dr. Jamie, who has spent the majority of the last 30 years as the sole physician in Clay County, entered into a Participation Agreement with Mountain State, which was extended by a mutually executed Addendum in 1994. (*Complaint* ¶¶ 6, 8). Mountain State

automatically renewed this contract in 1997 and 2000. Since Dr. Jamie opened his office, it has been run manually; he has no accounting software or computer-savvy personnel to help him track insurance billings and payments. (*Excerpted and redacted copy of the Deposition Transcript of Linda Gray, which is attached to Dr. Jamie's Motion for Partial Summary Judgment (hereinafter "MSJ") as Exhibit C (hereinafter "Gray Depo.")* at 42, 48). Dr. Jamie has always had a small staff of two to four persons who, in addition to completing claim forms, must administer myriad other medical office functions, such as greeting and attending to the constant influx of patients, the vast majority of whom are walk-ins; retrieving and replacing medical files; recording diagnoses and treatment; centrifuging blood samples; collecting co-pays; and maintaining customer accounts. (*Excerpted and redacted copy of the Deposition Transcript of Sharooz S. Jamie, which is attached to the MSJ as Exhibit B (hereinafter "Jamie Depo.")* at 19 – 20; *Gray Depo.* at 17, 22 – 25; *excerpted and redacted copy of the Deposition Transcript of Freda Berry, which is attached to the MSJ as Exhibit D (hereinafter "Berry Depo.")* at 14 - 15; and *excerpted and redacted copy of the Deposition Transcript of Connie Lane, which is attached to the MSJ as Exhibit E (hereinafter "Lane Depo.")* at 19 – 20, 31 – 33).

One of the tasks involved in maintaining customer accounts is to bill patients' insurance providers for services rendered in the doctor's office. Insurance billing has to be "coded," that is, every service that a physician performs for a patient is assigned a unique coding number in accordance with the Current Procedural Technology ("CPT") Manual published by the American Medical Association. (*Berry Depo.* at 49). After Dr. Jamie sees a patient, the staff reviews his handwritten notes, assigns CPT codes to the various services rendered, then fills out and mails to the patient's insurance company a standard claim form ("HCFA-1500") for processing payment. (*Gray Depo.* at 62-64).

A HCFA-1500 routinely bills for several coded services, such as an office visit or blood draw, and these are typically billed in single units. (*MSJ Exhibit F at Item 24 & Column G*). That is, Dr. Jamie's interaction with a patient on any given day normally entails just one office visit, and, if blood is drawn, just one instance thereof. (*Berry Depo.* at 160-63). After the blood is taken from the patient, it is placed in test tubes, centrifuged (or "spun") at Dr. Jamie's office, then picked up for analysis by LabCorp, a company specializing in laboratory services. (*Id.*).

There are exceptions, however, to the rule of single-unit billing. As Mountain State's Manager for Legal Recoveries, David Marion, acknowledged, it is permissible to bill more than one unit for repeated administrations of certain medicines or injections. (*Excerpted copy of the Deposition Transcript of David Marion, which is attached to the MSJ as Exhibit A (hereinafter "Marion Depo.")* at 41-42). Indeed, Dr. Jamie's office has long been accustomed to being reimbursed in bulk when testing patients for several allergens (CPT 86003) or when ordering multiple doses of immunotherapy (CPT 95165). (*Responses of Plaintiff to Defendant's Request for Production of Documents Set One (excerpted and redacted copy attached to the MSJ as Exhibit G)* at MSBC00007, 00048). In Dr. Jamie's office, his staff completed all the claim forms and signed them on his behalf. (*Lane Depo.* at 63-64).

Sometime in 2000, or perhaps a bit before, Dr. Jamie's office began to bill in multiple units for the testing performed on the blood drawn from patients. These panel tests had myriad elements, that is, they were designed to elicit results on a multitude of different things, such as albumin or potassium levels. Dr. Jamie's office therefore billed Plaintiff between 14 and 19 units, depending on the number of panel elements. Thus, a completed HCFA-1500 that included a charge for blood testing would bill for the office visit at 1 unit, the blood draw at 1 unit, and the panel procedure at 14, 15, 16, or 19 units. (*Berry Depo* at 50-51; *MSJ Exhibit F* at Item 24 & Column G).

The CPT Manual identifies the 14-element test as a Comprehensive Metabolic Panel ("CMP"), coded 80053. If the CMP is performed in conjunction with other specified tests, it can be billed as a General Health Panel ("GHP"), coded 80050. In 2000, Dr. Jamie's office billed Plaintiff four times for CMPs under code 80053, for which they received three wildly varying amounts in payment: \$133.00, \$210.00, and \$400.00. (*MSJ Exhibit G* at MSBC00104, 00135, 00257, 00268). This trend continued into 2001, when Mountain State, whom Dr. Jamie's office billed eighteen times for CMPs, reimbursed nine different amounts ranging from \$14.56 to \$399.98. (*Id.* at MSBC 00003, 00005, 00006, 00037, 00100, 00120, 00141, 00156, 00182, 00185, 00216, 00226, 00261, 00263).

Early in 2002, Dr. Jamie began adding elements to his standard panel, and his office began billing Plaintiff primarily for GHPs under code 80050. (*Gray Depo.* at 92-93). Reimbursements, however, still varied confusingly. For a 15-element panel billed less than 30 times, Dr. Jamie's office was paid one of five amounts: \$607.50, \$546.75, \$283.50, \$442.85, or \$46.75. (*MSJ Exhibit G* at MSBC00012, 00108, 00171, 00201, 00223). On the dozen occasions that the panel comprised 16 elements, the reimbursement was \$429.92 (*Id.* at 00038), or perhaps it was \$530.00 (*Id.* at 00036), or, every so often, it amounted to \$583.20 (*Id.* at 00070), or \$648.00 (*Id.* at 00020), or maybe \$665.00 (*Id.* at 00056).

By 2003, Dr. Jamie's office hardly knew what to do. No one there had ever had any formal training with respect to CPT coding. (*Gray Depo.* at 67; *Lane Depo.* at 42). Dr. Jamie had added a few more elements for testing, which the staff alternately billed as a GHP under 80050 or a CMP under 80053. (*Marion Depo.* at 37; see generally *MSJ Exhibit G*). When the latter occurred, Mountain State frequently rejected that portion of the claim and "re-bundled" or reprocessed it as a

GHP. (*Gray Depo.* at 124; see generally *MSJ Exhibit G*). Regardless of how the claims were processed, the amounts reimbursed continued to defy prediction.

Freda Berry, whom Dr. Jamie hired in August 2002 specifically to assist with billing problems, (*Berry Depo.* at 10-12), telephoned Plaintiff's Customer Service Representatives ("CSRs") ten to fifteen times every single week throughout 2003 to discuss irregularities in claims processing, mostly relating to codes 80050 and 80053. (*Id.* at 57, 60). Previously, Linda Gray had dealt with the CSRs, who "between fifty and one hundred" times requested "documentation" and rebilling of the claim. (*Gray Depo.* at 104-05). Rebilling would sometimes result in additional units being reimbursed, but sometimes not. (*Id.* at 104-05; 116-17). In certain instances, CSRs specifically instructed Ms. Gray to bill multiple units of both 80050 and 80053. (*Id.* at 120-21, 124-25). Twice during this avalanche of phone calls, the CSRs told Ms. Berry that the panel codes were supposed to be billed as single units. (*Id.* at 63). On at least two other occasions, however, the disputed claim was reimbursed in multiple units after Dr. Jamie's office, upon request, supplied Mountain State with medical records and lab results for hands-on review and evaluation. (*Id.* at 67-68; *MSJ Exhibit H* at 2). Following Mountain State's approval, Dr. Jamie's office continued to bill the blood panels in multiple units.

At some point in time, questions arose from Mountain State concerning Dr. Jamie's billing procedures relating to a 19 unit panel test, CPT Code 80050. In May, 2003, Dr. Jamie's files were sent to Mountain State for review in connection with these questions. It appears as though after the review Mountain State continued to pay claims consistent with its prior practice. In August, 2003, Dr. Jamie again signed a contract with Mountain State, but he attempted to terminate this contract by letter dated November 14, 2003. (*Defendant's Second Amended Counterclaim*, ¶¶ 9 and 10). There is some question concerning whether the contract termination was to occur thirty (30) days or

ninety (90) days from the date of the letter (*Plaintiff's Motion to Dismiss*, p. 6), but even using the 90-day period argued by Mountain State, the contract should have terminated on or about February 14, 2004. Mountain State failed to terminate the contract provided for in its very terms and extended the term of Dr. Jamie's contract, without his consent and contrary to his specific request until approximately March 20, 2004.

On or about December 11, 2003, Mountain State, through representatives headed by David Marion, conducted an audit of Dr. Jamie's medical and financial records at his office. (*Marion Depo.* at 28, 52). Mr. Marion reported the audit findings to Lil Mays, Plaintiff's manager of external provider relations for Mountain State. (*Excerpted copy of the Deposition Transcript of Lillie Mays, which is attached to the MSJ as Exhibit I (hereinafter "Mays Depo.")* at 16). On December 18, 2003, Mountain State, through Ms. Mays (and for the first time in a definitive fashion), "clarified" to Linda Gray, Dr. Jamie's office manager, that the blood panels were to be billed in single units. (*Id.* at 24, 26-29, 35-37). Following further discussions, Ms. Gray related this information in writing to the remainder of the staff. (*MSJ Exhibit J* at 2-3; *Gray Depo.* at 108-113, 116-17). From that time forward, Dr. Jamie's office has complied with Mountain State's instructions to the letter. (*Marion Depo.* at 67; *Gray Depo.* at 86; *Berry Depo.* at 71-72).

In the wake of the audit, Mountain State determined that it overpaid Dr. Jamie each time that it had reimbursed a claim coded 80050 or 80053 billed in multiple units. In early 2004, through the use of "automatic remittance adjustments," Mountain State began to withhold current reimbursements legitimately due Dr. Jamie in recoupment of the alleged overpayments. (*MSJ Exhibit K* at MSBC01270-71, 01275-76; *Marion Depo.* at 72-73). Prior to the cessation of the parties' business relationship, Mountain State confiscated nearly \$56,000 from Dr. Jamie. Contending that almost \$60,000 was yet due and remained unpaid, Mountain State filed the instant

action on December 22, 2004, alleging claims for breach of contract (Count One), for unjust enrichment (Count Two), for specific performance and injunctive relief to permit inspection of the entirety of Dr. Jamie's records (Count Three), and for fraud (Count Four).

Dr. Jamie filed his *pro se* Answer and Counterclaim on January 13, 2005. Thereafter, Dr. Jamie obtained counsel and submitted an amended counterclaim to assert ten specific counts against Mountain State. The circuit court, by its Order of February 27, 2006, dismissed the counterclaim in its entirety, and it subsequently denied Dr. Jamie's motion to alter or amend its previous ruling pursuant to Rule 59(e).

ASSIGNMENTS OF ERROR

1. The circuit court erred in dismissing Dr. Jamie's counterclaim with prejudice, because it used the wrong standard required to overcome a motion to dismiss, thereby placing a heavier burden on Dr. Jamie than he was required to carry, and the dismissal with prejudice violated the clear precedent of this Court.

2. The circuit court erred in dismissing Dr. Jamie's counterclaim, because he sufficiently stated a cause of action in each count thereof.

POINTS AND AUTHORITIES RELIED UPON

Cases

<i>Basham v. General Shale</i> , 180 W. Va. 526, 377 S.E.2d 830 (1989)	19
<i>Belcher v. Wal-Mart Stores, Inc.</i> , 211 W. Va. 712, 568 S.E.2d 19 (2002)	23, 24-25
<i>Bell v. The National Republican Congressional Committee</i> , 187 F. Supp. 2d 605 (2002) ..	26
<i>Chapman v. Kane Transfer Co.</i> , 160 W. Va. 530, 236 S.E.2d 207 (1977)	11
<i>Commercial Property Invs., Inc. v. Quality Inns Int'l, Inc.</i> , 61 F.3d 639 (8th Cir. 1995) ..	18
<i>Craddock v. Apogee Coal Co.</i> , 166 Fed. Appx. 679 (2006)	21

<i>Crain v. Lightner</i> , 178 W. Va. 765, 364 S.E.2d 778 (1987)	23
<i>Crump v. Beckley Newspapers, Inc.</i> , 173 W. Va. 699, 320 S.E.2d 70 (1984)	25
<i>Fujisawa Pharmaceutical Co., Ltd. v. Kapoor</i> , 814 F. Supp. 720 (N.D. Ill. 1993)	18
<i>Hager v. Exxon Corp.</i> , 161 W. Va. 278, 241 S.E.2d 920 (1995)	18
<i>Hartmann v. Windsor Hotel Co.</i> , 132 W. Va. 307, 52 S.E.2d 48 (1949)	20
<i>Homes v. Monongahela Power Co.</i> , 136 W. Va. 877, 884, 69 S.E.2d 131, 136 (1952) ...	17
<i>John W. Lodge Distributing Co., Inc. v. Texaco, Inc.</i> , 161 W. Va. 603, 245 S.E.2d 157 (1978)	10
<i>Lakes O' Woods Club v. Wilhelm</i> , 126 W. Va. 447, 28 S.E.2d 915 (1944)	15
<i>Longwell v. Board of Educ. of County of Marshall</i> , 213 W. Va. 486, 583 S.E.2d 109 (2003) .	10, 11
<i>Mandolidis v. Elkins Industries, Inc.</i> , 161 W. Va. 695, 246 S.E.2d 907 (1978)	10
<i>Midwest Commerce Banking Co. v. Elkhart City Centre</i> , 4 F.3d 521 (7th Cir. 1993)	18
<i>Padon v. Sears Roebuck & Co.</i> , 186 W. Va. 102, 411 S.E.2d 245 (1991)	26
<i>Pegram v. Herdrich</i> , 530 U.S. 211 (2000)	19
<i>Pettus v. Olga Coal Co.</i> , 137 W. Va. 492, 72 S.E.2d 881 (1952)	21
<i>Pocahontas Mining Company Limited Partnership v. OxyUSA, Inc.</i> 202 W. Va. 169, 503 S.E.2d 258 (1998)	18
<i>Price v. Halstead</i> , 177 W. Va. 592, 355 S.E.2d 380 (1987)	11
<i>Realmark Devs., Inc. v. Ranson</i> , 214 W. Va. 161, 588 S.E.2d 150 (2003)	15
<i>Rhododendron Furniture & Design v. Marshall</i> , 214 W. Va. 463, 590 S.E.2d 656 (2003) .	12
<i>Silk v. Flat Top Construction, Inc.</i> , 192 W. Va. 522, 453 S.E.2d 356 (1994)	16
<i>United Roasters, Inc. v. Colgate-Palmolive Co.</i> , 649 F.2d 985 (4th Cir. 1981)	14-15
<u>Statutes</u>	
W. Va. Code § 33-45-2	22

Rules of Court

W. Va. R. Civ. P. 2	15
W. Va. R. Civ. P. 8(e)(2)	14
W. Va. R. Civ. P. 9(b)	18
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ARGUMENT

A. STANDARD OF REVIEW

This appeal involves a dismissal of claims under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. The Court’s review of such a dismissal is *de novo*. Longwell v. Board of Education of County of Marshall, 213 W. Va. 486, 583 S.E.2d 109, 111 (2003). Dismissal of a claim under Rule 12(b)(6) is inappropriate “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Id. (citations omitted).

B. THE CIRCUIT COURT ERRED IN ANALYZING THE SUFFICIENCY OF DR. JAMIE’S COUNTERCLAIM USING THE WRONG STANDARD AND IN DISMISSING THE COUNTERCLAIM WITH PREJUDICE.

1. The circuit court improperly dismissed Dr. Jamie’s counterclaim by applying a more stringent standard than is contemplated by the Rules.

Applying the proper standard of review, Dr. Jamie’s counterclaim states claims upon which relief can be granted and should proceed past the initial pleading stage of litigation. This Court has held that, if a [counterclaim] states a claim upon which relief can be granted under *any* legal theory, a motion under Rule 12(b)(6) must be denied. The trial court should not dismiss a [counterclaim] merely because it doubts that the [counterclaim] plaintiff will prevail in the action, *because this is neither the purpose nor function of Rule 12(b)(6)*. See, John W. Lodge Distributing Co., Inc. v. Texaco, Inc., 161 W. Va. 603, 245 S.E.2d 157 (1978); Mandolidis v. Elkins Industries, Inc., 161 W.

Va. 695, 246 S.E.2d 907 (1978) (emphasis added). It is well settled that the trial court, in appraising the sufficiency of a [counterclaim] on a Rule 12(b)(6) motion, should not dismiss the [counterclaim] “unless it appears beyond doubt that the [counterclaim] plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” Longwell, supra; Chapman v. Kane Transfer Co., 160 W. Va. 530, 236 S.E.2d 207 (1977). On a motion to dismiss, the [counterclaim] is construed in the light most favorable to the [counterclaim] plaintiff. Price v. Halstead, 177 W. Va. 592, 355 S.E.2d 380 (1987) (emphasis added).

In the instant case, however, the circuit court accepted as true *Mountain State's* allegations, not Dr. Jamie's. This is clear from a review of the transcript of the hearing on Mountain State's 12(b)(6) motion to dismiss Dr. Jamie's counterclaim. With regard to Count 1, Dr. Jamie's breach of contract claim, the Court stated that Mountain State breached the contract “to prevent Dr. Jamie from further violating the contract.” (See, 2/23/06 Hearing Transcript which is attached to Dr. Jamie's “Motion to Alter or Amend Court Order Granting Plaintiff's Motion to Dismiss Second Amended Counterclaim” as Exhibit 2 (hereinafter “Transcript”) at p. 40). Further, the Court stated that “it sounds like you say they didn't terminate the contract and gave him the opportunity to keep over billing.” (*Id.*). Regarding Count 2, Dr. Jamie's claim under W. Va. Code § 33-45-2, the court stated to counsel for Mountain State, “Your point is, you didn't deny the claim; you actually paid the claim when they were submitted, didn't you? And you aren't retroactively denying it; you are just making an adjustment because of overpayment? For services which weren't performed.” (*Id.* at 18 – 19). Again, in the argument on the slander count, the court states, “There couldn't be damages. . . . I don't think it is defamatory in the first place. . . .” (*Id.* at 24). Based on the foregoing, it is clear that the circuit court was not testing the legal effect of a set of facts, assumed to be true for the purposes

of surviving a 12(b)(6) motion, but instead was testing the proof of the facts themselves. Because that is neither the purpose nor function of Rule 12(b)(6), the circuit court's judgment order in favor of Mountain State on Dr. Jamie's counterclaim must be reversed, and this matter must be remanded with directions to the circuit court to reinstate the counterclaim.

2. **The circuit court improperly dismissed Dr. Jamie's counterclaim with prejudice.**

The circuit court dismissed Dr. Jamie's counterclaim in its entirety with prejudice. (*Transcript* at p. 46). However, this is contrary to West Virginia law. In Rhododendron Furniture & Design v. Marshall, Syl.Pt. 3, 214 W.Va. 463, 590 S.E.2d 656 (2003), this Court held that "If summary judgment is entered under Rule 56 R.C.P., it is a dismissal with prejudice; whereas, a judgment sustaining a motion to dismiss under Rule 12(b) R.C.P. is not a dismissal with prejudice." (emphasis added). The Court goes on to say that "whether the circuit court dismisses a party's case under Rule 12 or Rule 56 determines if the nonmoving party will have the opportunity to re-file, amend their complaint, or conduct additional discovery." *Id.* at 466, 659. Accordingly, the circuit court erred in dismissing the counterclaim with prejudice, and its order should be reversed and this matter remanded with directions to reinstate the counterclaim or allow Dr. Jamie to amend his counterclaim within the confines of the West Virginia Rules of Civil Procedure.

C. **THE CIRCUIT COURT ERRED IN DISMISSING DR. JAMIE'S COUNTERCLAIM, BECAUSE EACH COUNT THEREOF STATES CLAIMS UPON WHICH RELIEF CAN BE GRANTED.**

1. **Dr. Jamie's counterclaim adequately states a breach of contract claim against Mountain State for Mountain State's failure to cancel the Participation Agreement upon his request.**

On or about November 14, 2003, Dr. Jamie attempted to terminate his current contract with Mountain State, providing 30 days notice. Mountain State suggests that Dr. Jamie's letter stated

that it provided 90 days notice of termination. Even if that were true, Dr. Jamie's contract still should have been cancelled by approximately February 13, 2004. However, Mountain State did not ultimately cancel the contract until March 20, 2004. Accordingly, while there is some confusion over the exact number of days of notice provided by Dr. Jamie, even under Mountain State's version, Mountain State did not cancel the contract in accordance with Dr. Jamie's request, pursuant to the contract.

Moreover, Dr. Jamie maintains that Mountain State wrongfully denied claims and withheld or offset payments. (*Defendant's Second Amended Counterclaim*, ¶ 13). Mountain State argues that its "adjustments to payments to Dr. Jamie were made in accord with his Participation Agreement to recoup payments to Dr. Jamie when he fraudulently billed for multiple units of test panels, although only one panel – one unit – was performed, or when he billed for a panel comprising of 19 tests after performing a panel comprising only 14 tests." (*Plaintiff's Motion to Dismiss*, p. 7). "Through those adjustments, Mountain State was able to recoup approximately \$56,000 that Dr. Jamie had overbilled." (*Id.*)

The appropriate place for Mountain State's arguments, which at base demonstrate a genuine issue of material fact, are to a jury; they have no place in a Rule 12(b)(6) motion, in which all the facts asserted must be viewed in a light favorable to the counterclaim plaintiff. Mountain State and the circuit court presupposed that Dr. Jamie has already been found liable for fraudulent over-billing. Obviously, Dr. Jamie vigorously denies this claim. If Dr. Jamie is not found liable for this alleged misconduct, then clearly Mountain State's "adjustments to payments" withholding \$56,000 of properly owed payments to Dr. Jamie is the basis for a civil breach of contract claim. Accordingly, Dr. Jamie adequately stated a claim for breach of contract, and the trial court erred in dismissing this claim.

2. **Dr. Jamie's adequately stated claims of breach of the covenant of good faith and fair dealing and for wrongfully withholding payments (fraud) as alternate theories of his case, which is permissible pursuant to Rule 8(e)(2).**

In Count III of his counterclaim, Dr. Jamie pleads a cause of action for breach of the covenant of good faith and fair dealing. In Count IV, he pleads fraud based on Mountain State's wrongful withholding of payments. Mountain State argues that these claims duplicate his breach of contract claim and therefore, should be dismissed. (*Plaintiff's Motion to Dismiss*, pp. 9-10). However, this position is clearly contrary to the West Virginia Rules of Civil Procedure.

Rule 8(e)(2) plainly states that, "A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses." The rule goes on to say that, "A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or both." *Id.*

Moreover, the elements of each of these three claims are different. While Dr. Jamie acknowledges that he is not entitled to a "double recovery" as argued by Mountain State, he certainly is entitled to explore and present as many separate claims as he may have, even if they are based on the same set of operative facts.

The Fourth Circuit Court of Appeals confirmed this position in United Roasters, Inc. v. Colgate-Palmolive Co., 649 F.2d 985, 990 (4th Cir. 1981). In United Roasters, plaintiff alleged a theory of bad faith against defendant in the exercise of defendant's right of termination of a contract. In Count 3, it alleged non-performance of defendant's express contract obligations, or breach of contract. At the conclusion of the presentation of plaintiff's case, the lower court required plaintiff to make an election between the two theories. On appeal, the 4th Circuit ruled that:

The plaintiff was wrongly forced to make the election it did. Rule 8(e)(2) of the Federal Rules of Civil Procedure [which is identical to

W.Va.R.Civ.P. 8(e)(2)] permits the pleading of alternative or inconsistent claims. . . . Ordinarily, a plaintiff may pursue alternative remedies, however 'inconsistent,' with final 'election' postponed to a late stage of the action after the proof is in or even after the fact-finder, court or jury, has made its findings on both alternatives." *Citing Restatement (Second) of Judgments s 61.1, Comment m, at 174-75.*

Id. The United Roasters Court went on to say:

Of course, the legal theories exemplified by Counts 1 and 3 of the complaint were not in the least inconsistent. They were simply alternative theories based upon the same set of operative facts. To the extent that each theory had legal validity as applied to the operative facts, the plaintiff was entitled to have both theories submitted to the jury, and should not have been required to make the election it did.

Id. at 990-91. Accordingly, the circuit court's dismissal of these claims is clearly contrary to the West Virginia Rules of Civil Procedure and its Order dismissing them should be reversed.

3. **Dr. Jamie adequately stated a claim for negligence and breach of contract as alternative theories of his case, which is permissible pursuant to Rule 8(e)(2).**

In Count Eight of his counterclaim, Dr. Jamie pleads a cause of action for negligence. Mountain State argues that he may not recover in tort for breach of a purely contractual obligation. (*Plaintiff's Motion to Dismiss*, p. 13). In support of this proposition, Mountain State cites a 1944 case, Lakes O'Woods Club v. Wilhelm, 126 W.Va. 447, 453, 28 S.E.2d 915, 918. However, as this honorable Court is aware, the West Virginia Rules of Civil Procedure were adopted and promulgated by the Supreme Court of Appeals on October 13, 1959, and became effective on July 1, 1960 – sixteen years after Lakes. Pursuant to W.Va.R.Civ.P. 2, "There shall be one form of action to be known as "civil action." This rule abolished the distinction between law and equity, which was the basis for the ruling cited by Mountain State in Lake O'Woods Club. Realmark Devs., Inc. v. Ranson, 214 W.Va. 161, 588 S.E.2d 150 (2003). In other words, the West Virginia Rules of Civil Procedure supersede Lake O'Woods Club.

Again, Mountain State asserts that “a party is not entitled to bring multiple claims for the same injury in an attempt at double recovery.” (*Plaintiff’s Motion to Dismiss*, p. 13). However, as stated above, Rule 8(e)(2) plainly states that, “A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses.” The rule goes on to say that “A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or both.” *Id.*

Moreover, the elements of each of these claims are different. While Dr. Jamie acknowledges that he is not entitled to a “double recovery” as argued by Mountain State, he certainly is entitled to explore and present as many separate claims as he may have, even if they are based on the same set of operative facts. Furthermore, Dr. Jamie’s negligence claim is based not only on his breach of contract claim, but also on his claims for violation of a statute and breach of the duty of good faith and fair dealing. Accordingly, his negligence claim is separate and independent of his breach of contract claim, and it stands on its own. Finally, even if his negligence claim was merely duplicative of his breach of contract cause of action, there are serious questions presented in this case as to what time periods Dr. Jamie was actually under contract with Mountain State. Therefore, if it is determined that a contract did not exist during certain time periods, Dr. Jamie would certainly be permitted to proceed on his claim for negligence based on Mountain State’s conduct during those time frames.

Mountain State and the trial court relied on *Silk v. Flat Top Construction, Inc.*, 192 W. Va. 522, 453 S.E.2d 356 (1994) for the proposition that a party may not bring a negligence claim as an alternative to a breach of contract claim; the party must choose one theory or another. Dr. Jamie does not argue with that well-settled point of law; however, as outlined above, that is not what he is

attempting to do in the instant case. Further, both Mountain State and the trial court overlooked this Court's finding in Homes v. Monongahela Power Co. that:

Where the transaction complained of had its origin in a contract which places the parties in such a relation that in attempting to perform the promised service the tort was committed, the breach of contract is not the gravamen of the action. The contract in such case is mere inducement, creating the state of things which furnishes the occasion of the tort, and in all such cases the remedy in an action *ex delicto*, and not an action *ex contractu*.

136 W. Va. 877, 884, 69 S.E.2d 131, 136 (1952) (quoting 12 Am.Jur., Contracts, § 459). The Homes Court found that, even though the parties had a contractual relationship whereby Mon Power was obligated to provide electric power to the plaintiff in exchange for consideration, and that obligation was arguably breached when Mon Power failed to deliver electric power to the plaintiff on three separate occasions, the plaintiff adequately stated a claim for negligence based on Mon Power's failure to restore the service promptly. Such is the case here: even though Dr. Jamie and Mountain State had a contractual relationship, which the parties argue was breached from both sides, Dr. Jamie adequately stated a claim for negligence based on Mountain State's violations of W. Va. Code § 33-45-2 and its breach of the duty of good faith and fair dealing. Accordingly, the circuit court's dismissal of these claims is clearly contrary to the law, and its Order dismissing them should be reversed.

4. **Dr. Jamie adequately stated a fraud claim, and it is pled with the required particularity.**

Dr. Jamie claims that Mountain State fraudulently, consistently and routinely underpaid him for certain specific services. (*Defendant's Second Amended Counterclaim*, Count 5). Mountain State argues that this claim is not pled with the particularity required by the West Virginia Rules of Civil Procedure (*Plaintiff's Motion to Dismiss*, page 10), and the circuit court

agreed. However, they are operating under a misapprehension regarding what is required to satisfy requisite particularity, and Dr. Jamie's claim is sufficient.

The "rationale for the requirements of subdivision (b) [of Rule 9] is to permit the party charged with fraud the opportunity to prepare a defense." Hager v. Exxon Corp., 161 W.Va.278, 283, 241 S.E.2d 920, 923 (1978). As pointed out by Justice Workman in her concurring opinion in Pocahontas Mining Company Limited Partnership v. Oxy USA, Inc., 202 W.Va. 169, 172-73, 503 S.E.2d 258, 261-62 (1998), "While this Court has enforced the principles of Rule 9(b) and has rendered opinions based upon the inadequacy of pleadings pursuant to Rule 9(b), it has not delineated any precise definition of the specificity with which the allegation of fraud must be made." Justice Workman explained that, in answering the question of how much is enough, "since our law on this subject is sparse, it is helpful to examine other jurisdictions." Id. The Seventh and Eighth Circuits have held that a pleading need not contain the legal theory underpinning an allegation of fraud, nor is there a requirement that each and every misrepresentation be set out in a pleading. See, Commercial Property Invs., Inc. v. Quality Inns Int'l, Inc., 61 F.3d 639 (8th Cir. 1995); Midwest Commerce Banking Co. v. Elkhart City Centre, 4 F.3d 521 (7th Cir. 1993). Further, where fraud allegedly occurred over a period of time, the requirements of Rule 9(b) are less stringently applied. Fujisawa Pharmaceutical Co. Ltd. v. Kapoor, 814 F.Supp. 720 (N.D. Ill. 1993). Justice Workman concluded that "pleading the fraud claim must be distinguished from proving the fraud claim; the pleading must not be expected to include every element of the proof." Pocahontas Mining Company, 202 W.Va. at 174, 503 S.E.2d at 263. "Rule 9(b) has been interpreted to require only the pleading with particularity, rather than an exhaustive narration of every facet of proof which will later be adduced in the action for fraud." Id.

In the instant case, Dr. Jamie has pled his claim of fraud with enough particularity to permit Mountain State the opportunity to prepare a defense. In Count Five, Dr. Jamie explains specifically the CPT code for which he was underpaid, the specific amount which he charged, the fact that Mountain State revised his claim, the specific amount that he was improperly reimbursed, and why Mountain State's conduct constitutes fraud. Moreover, statements in a [counterclaim] may be "given content by other elements of the complaint." Pegram v. Herdrich, 530 U.S. 211, 230 (2000). Particularly, "where specific allegations clarify the meaning of broader allegations, they may be used to interpret the [counterclaim] as a whole." Id.

The instant case is not analogous to those in which this Court has found that the pleading of fraud was *not* made with requisite particularity. For example, in Hager, plaintiffs undertook to prove fraud at trial, and the lower court allowed it over defendant's objection. On appeal, this Court pointed out that plaintiffs "not only failed to plead the circumstances constituting fraud or mistake, *they did not even allege fraud or mistake in their complaint.*" Id. at 283, 923 (emphasis added). Obviously, in such a case, the defendant was not prepared to defend on that charge. Similarly, in Basham v. General Shale, 180 W.Va. 526, 531-32, 377 S.E.2d 830, 835-36 (1989), petitioner claimed that respondent "sold defective bricks knowing that the defects would not be discovered until after the statute of limitations had expired." The Court ruled that "because the petitioners do no more than express their opinion that the respondent fraudulently sold them defective brick, we cannot find that they have stated a cause of action." Id. Again, the defendant in that case could not be prepared to defend such a charge. As outlined above, such is not the case with Dr. Jamie's counterclaim. Accordingly, based on West Virginia law and instructional guidance from federal courts interpreting the identical rule, the circuit court erred in dismissing

this count of Dr. Jamie's counterclaim, and this matter should be remanded with instructions to reinstate the same.

5. **Dr. Jamie adequately stated a claim for fraud against Mountain State regarding Mountain State's overcharging members/patients for deductibles and co-payments, because he has standing as a creditor-beneficiary to bring such action.**

Dr. Jamie posits in his counterclaim that Mountain State overcharged participant members/patients the deductibles and co-payments under their contracts of insurance with Mountain State. (*Second Amended Counterclaim*, Counts 6 and 7). Consequently, Dr. Jamie's patients would not have the money to pay the deductibles and/or co-payments, which often prevented them from continuing to seek medical attention from him. This detrimentally affected his medical practice. (*Id.*) Mountain State argued, and the circuit court agreed, that Dr. Jamie has no standing to bring such claims on behalf of his patients, even as a third party beneficiary, because the insurance contracts were not made with the patients for the "sole benefit" of Dr. Jamie. (*Plaintiff's Motion to Dismiss*, pp 11-13, *Transcript* p. 16).

However, Dr. Jamie's claims fall under an important exception to the rule relied upon by the court below, which is outlined in Syllabus Pt. 1 of Hartmann v. Windsor Hotel Co., 132 W.Va. 307, 52 S.E.2d 48 (1949). In Hartmann, this Court stated:

A person for whom compensation for services is provided under a contract made by others, to which contract he was not a party, is a creditor beneficiary thereunder, and may, in a suit in equity, recover under the same, even though such contract was not made for his sole benefit.

In Hartmann, a contract was entered into between seller and buyer. Within the contract, a fee was provided for in favor of a real estate broker. Clearly the contract was not made for the *sole benefit* of the broker. *Id.* at 318, 53. However, when he did not get paid, the Court found that the

broker had standing to bring suit directly against the seller as a creditor-beneficiary. Id. at 319, 53.

This rule has been applied in other cases as well. In Pettus v. Olga Coal Co., 137 W.Va. 492, 497-98, 72 S.E.2d 881, 884 (1952), this Court ruled that even though a contract was entered into between Olga Coal Co. and the United Mine Workers of America, when the company breached the contract, Olga employees had standing to bring suit directly against Olga. The Court pointed out that this contract was not made *solely* for the benefit of the employees; the UMWA derived certain rights and privileges under the contract. Id. at 496, 884. In Syllabus Point 1, the Court reiterated that “creditor beneficiaries, under a third party contract, may maintain a suit . . . for the recovery of damages allegedly resulting from a breach of the contract by the promisor named therein.” The Court explained that “such person is a creditor beneficiary if no intention to make a gift appears from the terms of the promise, and performance of the promise will satisfy an actual [or supposed] or asserted duty of the promisee to the beneficiary.” Id. at 497, 884.

This long standing rule has been affirmed as recently as February 9, 2006. In Craddock v. Apogee Coal Co., 166 Fed. Appx. 679 (2006), the Fourth Circuit affirmed the decision of the District Court for the Southern District of West Virginia that employees had standing to bring suit against Apogee Coal based on a contract between Apogee and Landmark Corporation regarding payment of post-employment benefits. The Craddock Court cited Pettus and Hartmann to support its position.

As outlined in the counterclaim, while the contract in question is between the participant members/patients and Mountain State, Dr. Jamie is paid compensation for services provided under that contract. So while he is not a party, he is a creditor beneficiary thereunder, and may recover

under the same, even though this contract was not made for his *sole* benefit. Accordingly, Dr. Jamie does have standing to bring these two causes of action against Mountain State and the circuit court erred when it dismissed these claims.

6. **Dr. Jamie adequately stated a claim against Mountain State for violations of W.Va. Code § 33-45-2, et seq.**

Dr. Jamie claims that in violation of West Virginia statute, Mountain State retroactively denied claims beyond the one year statutory cut-off date and failed to obtain Dr. Jamie's written authorization for an offset against future payments. (*Defendant's Second Amended Counterclaim*, ¶ 16). Mountain State argued that "Dr. Jamie mischaracterizes Mountain State's remittance adjustments as denied claims, and thus, again, fails to state a claim." (*Plaintiff's Motion to Dismiss*, pages 8-9). The circuit court again agreed with Mountain State, finding that this claim can be resolved in Mountain State's main breach of contract claim. (*Transcript* p. 45). Again, the trial court applied the wrong standard and overlooked the fact that Dr. Jamie's claim for violations of the insurance code are not affirmative defenses to a breach of contract claim, but a separate and independent cause of action, of which he pled all the requisite elements in his counterclaim.

Mountain State attempts to simplify the issue by using labels to get around the clear intent of the statute. The intent of the statute is to prevent health plans from improperly withholding monies from providers without their consent. Mountain State can call it what it likes; it retroactively took back payments (whether due to "denial" or "remittance adjustment") beyond the appropriate time limitation and without Dr. Jamie's consent to do so. Further, Mountain State insists that Dr. Jamie must demonstrate that he performed a nineteen-panel test nineteen times to explain why he should not be liable for fraud. However, Mountain State and the trial court overlooked the fact that Dr. Jamie does not have to prove anything at the 12(b)(6) stage – he simply has to outline a claim upon which relief can be granted at some point in the future, after he has been reasonable time to conduct

discovery on those claims. Accordingly, this cause of action is viable and the circuit court erred in dismissing the same.

7. **Dr. Jamie adequately stated a claim for slander.**

In Count Nine of his counterclaim, Dr. Jamie pleads a cause of action for slander. Mountain State argued that Dr. Jamie did not properly plead his claim, and the circuit court agreed, finding “There couldn’t be damages. . . . I don’t think it is defamatory in the first place. . . .” (*Transcript* p. 24). Again, the trial court is testing the proof of Dr. Jamie’s claims, not the sufficiency thereof.

The essential elements for a successful defamation action by a private individual are (1) defamatory statements; (2) a nonprivileged communication to a third party; (3) falsity; (4) reference to the plaintiff; (5) at least negligence on the part of the publisher; and (6) resulting injury. Belcher v. Wal-Mart Stores, Inc., 211 W.Va. 712, 568 S.E.2d 19 (2002). Mountain State did not challenge the fact that the statement made by its representative was defamatory; it instead argued that, “Dr. Jamie does not allege that the communication was to any independent third party. Rather, he alleges that it was made to his employees during an office audit.” (*Motion to Dismiss*, p. 14).

However, this is an inaccurate interpretation of the law. Clearly, “several of Dr. Jamie’s employees” constitute independent third parties. In Crain v. Lightner, 178 W.Va. 765, 364 S.E.2d 778 (1987), this Court stated, “‘Publication’ [referring to element 2 of a defamation claim] sufficient to sustain common-law slander is uttering the slanderous words to some third person so as to be heard and understood by such person.” The Crain court went on to say that “Publication . . . means any form of intentional or negligent communication of a defamatory statement to a third person, that is, to someone other than the originator and the person

defamed.” 178 W.Va. at 772, 364 S.E.2d at 785. Dr. Jamie’s employees are third parties within the meaning of the law.

In connection with this element, Mountain State further argued that “[Dr. Jamie] fails to allege that the communication was unprivileged, and, indeed, he pleads facts that establish it was privileged.” (*Motion to Dismiss*, page 14). Citing Belcher, Mountain State seems to be comparing its insurance representative’s audit of a physician’s office to a police officer’s investigation of criminal activity. In Belcher, the Court stated:

Qualified privileges are based upon the public policy that true information be given whenever it is reasonably necessary for the protection of one’s own interests, the interests of third persons or certain interests of the public. A qualified privilege exists when a person publishes a statement in good faith about a subject in which he has an interest or duty and limits the publication of the statement to those persons who have a legitimate interest in the subject matter; however, a bad motive will defeat a qualified defense.

Belcher, 211 W.Va. at 720, 568 S.E.2d at 27, *citing* Dzingski v. Weirton Steel Corp., 191 W.Va. 278, 445 S.E.2d 219 (1994). The Belcher Court went on to hold that “any statement made by an *employer to law enforcement officials* in the course of an *investigation of criminal activity* is privileged and provides no basis for a defamation suit, even assuming the accuracy of a plaintiff’s allegations.” (emphasis added). *Id.*, *citing* Aranyosi v. Delchamps, Inc., 739 So. 2d 911 (La. App. 1st Cir. 1999). Mountain State’s insurance audit of Dr. Jamie’s office in no way compares to this situation. Even if it was determined that a qualified privilege existed, as stated above, “a bad motive will defeat a qualified defense.” Dr. Jamie specifically alleged the auditor’s bad motive. (*Second Amended Counterclaim*, ¶ 54). Further, even if Mountain State is aiming to analogize between the auditor and the police officer, the analogy is misguided. In Belcher, Plaintiff sued Wal-Mart for defamation based on statements made by Wal-Mart

employees to the police officer during the course of an investigation of a stolen computer. The Belcher court held that those communications made to the police officer were privileged. In the case at bar, it was the *auditor* making the defamatory statements to *Dr. Jamie's employees*. Mountain State's attempted comparison is misguided, as these two situations are in no way analogous. The auditor's statement to Dr. Jamie's employees was a nonprivileged communication to third parties satisfying the second element of a defamation claim.

Mountain State does not dispute that the auditor's statement was false, or that it referenced Dr. Jamie, elements three and four of a defamation claim. Mountain State does, however, argue that Dr. Jamie "fails to allege that the statement was negligently made." (*Motion to Dismiss*, p. 14). As the standard is one of negligence, the "conduct of the defendant is to be measured against what a reasonably prudent person would have done under the same or similar circumstances." Crump v. Beckley Newspapers, Inc., 173 W.Va. 699, 706, 320 S.E.2d 70, 77 (1984). Dr. Jamie identified the statement and explained that the auditor made such statement to defame him in an unsuccessful attempt to coerce and trick Dr. Jamie's employees to testify against him. (*Second Amended Counterclaim*, ¶ 54). A reasonably prudent person would not have made such statements under the same or similar circumstances. This allegation demonstrates at least negligence on the part of the publisher, satisfying element five of a defamation claim.

Finally, Mountain State argues that "Dr. Jamie alleges that the comment was false, but in so doing, he precludes any basis for claiming injury." (*Motion to Dismiss*, page 15). "If, as he expressly pled, his employees 'knew that the statements were and are entirely false,' then the statements could not have injured Dr. Jamie. (*Id.*) However, this too is inaccurate. First, just because each employee may have known that Dr. Jamie did not make such a statement to him or

her, each employee did not know what Dr. Jamie may or may not have told the other employees. Therefore, the defamatory statement was injurious. Second, in Bell v. The National Republican Congressional Committee, 187 F. Supp.2d 605, 615 (2002), the United States District Court for the Southern District of West Virginia held that “Plaintiff need prove only the element of publication; if he has shown that the statement was made to a third person, and that the statement is defamatory, harm to reputation is presumed.” Bell, citing Crain v. Lightner, 178 W.Va. 765, 364 S.E.2d 778, 785 (1987).

Ultimately, Mountain State argues that “even if Count Nine were properly pled, it would be barred by the one-year statute of limitations applicable to defamation claims.” (*Motion to Dismiss*, p. 15). However, this argument is premature. While Dr. Jamie alleges that the statement was made on or about December 2003, there is some question over the specific date of the audit. Additionally, “in defamation actions, the period of the statute of limitations begins to run when the fact of the defamation becomes known, or reasonably should have been known, to the plaintiff.” Padon v. Sears, Roebuck & Co., 186 W.Va. 102, 411 S.E.2d 245 (1991). There is no evidentiary support in the record concerning “when the fact of the defamation [became] known, or reasonably should have been known, to [Dr. Jamie],” and indeed, there does not need to be such a showing at this stage. Dr. Jamie adequately stated a claim for slander that should survive Rule 12(b)(6) attack. Accordingly, the circuit court erred in dismissing this claim.

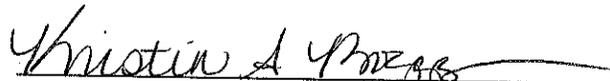
VI. CONCLUSION

The circuit court’s dismissal of Dr. Jamie’s counterclaims stands in stark and irreconcilable conflict with the West Virginia Rules of Civil Procedure and this Court’s precedent, most notably John W. Lodge and Chapman. The standard a counterclaimant must meet to overcome a 12(b)(6) motion to dismiss is a light one, and a trial court should not grant such a motion unless it is proved

beyond doubt that the counterclaimant could prove no set of facts entitling him to relief. In the instant case, Dr. Jamie set forth sufficient information in his Second Amended Counterclaim to outline the elements of his claims. This is all that is required to survive a 12(b)(6) motion.

Therefore, based on the foregoing, as well as for other reasons of justice apparent to this Honorable Court, Appellant respectfully requests that this Court reverse the final judgment of the Circuit Court of Wood County and remand this case with directions to reinstate the dismissed counterclaims and to conduct such further proceedings as may be required.

SHAROOZ S. JAMIE, M.D.
By Counsel,

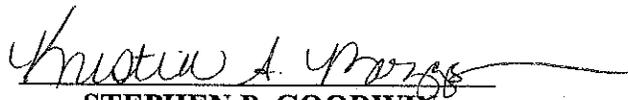

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CERTIFICATE OF SERVICE

The undersigned, counsel for Appellant, does hereby certify that the foregoing APPEAL BRIEF OF SHAROOZ S. JAMIE, M.D. has been served upon the following counsel of record by this day mailing to them a true copy thereof:

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Done this 15th day of June, 2007.


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