

Case No: 33863

**IN THE SUPREME COURT OF APPEALS
WEST VIRGINIA**

MATTHEW BRIAN YOAK, M.D.

Appellant,

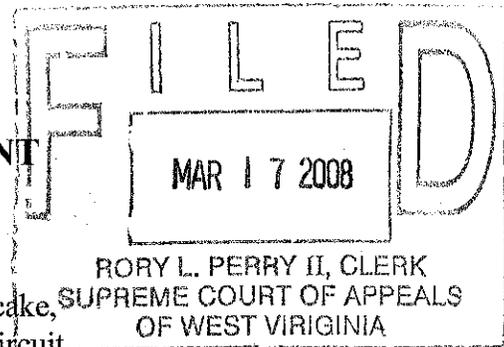
v.

**MARSHALL UNIVERSITY BOARD OF GOVERNORS,
UNIVERSITY PHYSICIANS AND SURGEONS, INC.,
and DAVID A. DURNING, M.D., Individually,**

Appellees.

BRIEF OF APPELLANT

From the May 23, 2007
Decision and Order of
The Honorable David M. Pancake,
Circuit Judge, Sixth Judicial Circuit
CA No. 06-C-0957



Counsel for Appellant

*William V. DePaulo, Esq. #995
179 Summers Street, Suite 232
Charleston, WV 25301-2163
Tel: 304-342-5588
Fax: 304-342-5505
william.depaulo@gmail.com*

March 17, 2008

TABLE OF CONTENTS

I. Nature of Proceeding and Ruling Below 4

II. Statement of Facts..... 4

 A. Facts Pertaining to Misappropriation of Identity 5

 B. Facts Pertaining to Negligent Credentialing 6

 C. Facts Pertaining to Wrongful Termination..... 6

 D. Facts Pertaining to Dr. Denning’s Malicious Tortious Interference 12

III. Assignments of Error 13

IV. Authorities Relied Upon 15

V. Argument 16

 A. Matthew B. Yoak’s Allegation That MUBG and UP&S Appropriated His Identity For Commercial Purposes By Continuing to Use His Commercially Valuable Name, and Credentials, Without His Consent and Without Compensation, Unjustly Enriching MUBG and UP&S Long After Appellant Had Left Appellee’s Employment, States A Cause of Action for Violation of the Right of Publicity..... 16

 B. The Circuit Court erred in dismissing -- without any discussion whatsoever -- Dr. Yoak’s claim for MUBG’s negligently publishing advertisements claiming inaccurately that Dr. Yoak was board certified in plastic surgery -- at a time when he was not -- which caused the accrediting board to delay Dr. Yoak’s accreditation for one year thereby subjecting him to continuing personal and professional embarrassment. 23

 C. The dismissal of Plaintiff’s Complaint against UP&S, a private corporation not entitled to any immunity whatsoever, on the grounds of qualified immunity, was error..... 24

 D. The Circuit Court erred in holding that MUGB and Dr. Denning were entitled to qualified immunity -- because Plaintiff had not alleged violation of any “clearly established rights” -- where the parties’ contract expressly incorporated the employee rights of notice and an opportunity to be heard, recited in Title 133, Series 9, CSR. 26

 1. The doctrine of anticipatory breach does not apply where the Plaintiff has alleged that the custom and practice of the MUBG at its School of Medicine routinely allowed professors to resign early without forfeiture of pay and/or benefits. 30

 2. The doctrine of anticipatory breach only addresses the timing of court action by an injured party, and the measure of damages, but does not authorize self-help, particularly

where the self-help employed –dismissal from employment of a public employee -- is governed by a highly developed law expressly incorporated into the parties' agreement, and readily available to MUBG and Denning..... 32

F. The Circuit Court erred in finding that Dr. Yoak failed to exhaust administrative remedies contained in a so-called "Green Book" which was never admitted to the record in the proceedings below..... 35

VI. Relief..... 37

VII. Certificate of Service 38

I. Nature of Proceeding and Ruling Below

This civil action for injunctive and monetary relief was commenced on October 23, 2006 by the filing of a Complaint¹ by Dr. Matthew B. Yoak against the Marshall University Board of Governors (MUBG), University Physicians and Surgeons, Inc. (UP&S), and David A. Denning, M.D., an employee of MUBG. In his Complaint Dr. Yoak alleged separate causes of action: (1) against MUBG misappropriation of identity, (2) against MUBG for negligent credentialing, (3) against MUBG and UP&S for wrongful termination, and (4) against Dr. Denning, individually, for malicious tortuous interference with contract. On May 23, 2007, Circuit Judge David M. Pancake entered an order dismissing Dr. Yoak's Complaint with prejudice under Rule 12 (b) (6) for failure to state a cause of action.

II. Statement of Facts

Under long standing decisions of this Court, all of the facts derived from Plaintiff's Complaint, and Plaintiff's representations incident to his opposition to the Defendants' motion to dismiss, are assumed to be true for purposes of a Rule 12(b)(6) motion. *Longwell v. Bd. of Educ.*, 213 W. Va. 486, 489 (W. Va. 2003). The parties to this proceeding include Appellant Matthew B. Yoak, a medical doctor licensed to practice in West Virginia and Ohio, and more fully described in subparagraph A below.

Appellant MUBG is an agency of the State of West Virginia. *King v. Heffernan*, 214 W. Va. 835, 840, n.3 (2003). MUBG operates the Joan C. Edwards School of Medicine in Huntington, West Virginia.

¹ Plaintiff's Complaint was initially filed in Kanawha County and was transferred by consent to Cabell County.

Appellant UP&S is a private West Virginia corporation which, through contract employees like Matthew Brian Yoak, provides professional services to MUBG.

Appellant David A. Denning is a medical doctor and Chairman of the Department of Surgery at the Joan C. Edwards School of Medicine at Marshall University. Dr. Denning was sued individually, under the provisions of Rule 8, W. Va. R. Civ. P. permitting pleading in the alternative, for actions taken with actual malice beyond the scope of his employment.

A. Facts Pertaining to Misappropriation of Identity

Matthew B. Yoak graduated from the Joan C. Edwards School of Medicine at Marshall University in Huntington, West Virginia in May 1995 with a degree in medicine. Thereafter, Dr. Yoak completed a five-year residency in surgery at the Joan C. Edwards School of Medicine in June 2000, and an additional two-year residency in plastic surgery at the Mayo Clinic, in Rochester, Minnesota in June 2002. Dr. Yoak has maintained his annual continuing medical education requirement and is currently board certified in Surgery and Plastic Surgery, and is employed by Marietta Health Care Physicians, Inc. which is affiliated with the Marietta Memorial Hospital in Marietta, Ohio. He continues to reside in West Virginia.

As explained in detail below in subparagraph C. pertaining to wrongful termination, on November 19, 2004, David Denning, without cause or resort to mandatory procedures explicitly incorporated in the parties' contract of employment, summarily dismissed Dr. Yoak from employment with MUGB and UP&S, effective December 3, 2004.

Notwithstanding this summary and totally illegal dismissal from employment, at least through May 7, 2005 – nearly 6 months after Defendants' November 19, 2004 summary dismissal of Plaintiff -- Defendant MUGB continued to list Plaintiff's name and his very

impressive professional qualifications, with obvious commercial value, on their internet website to attract new business. MUGB's use of Plaintiff's professional credentials was without the consent of, or compensation to, Plaintiff. MUGB was unjustly enriched by the commercial expropriation of Plaintiff's identity. The unauthorized exploitation of the good will and reputation of Plaintiff's name and qualifications, developed through Dr. Yoak's investment of time, money and effort over many years, in a commercial advertisement, without his consent or compensation, constituted a misappropriation of identity, for which Dr. Yoak is entitled to injunctive and monetary relief.

B. Facts Pertaining to Negligent Credentialing

In his Complaint, Dr. Yoak alleged that MUBG negligently published inaccurate information concerning Dr. Yoak's credentials – claims that he was board certified in plastic surgery at a time when he was not board certified -- which caused the credentialing authorities to sanction Dr. Yoak. David Denning explicitly and unhesitatingly admitted in letters to the plastic surgery credentialing authority, his sole personal responsibility for the inaccuracy. Nonetheless, that board strictly enforced their rules and sanctioned Dr. Yoak – not Dr. Denning – by delaying for one year, Dr. Yoak's board certification. As a consequence of this delay and the professional taint associated therewith, Plaintiff suffered personal and professional embarrassment and incurred damage to his professional reputation which will continue indefinitely.

C. Facts Pertaining to Wrongful Termination

As noted in Paragraph A above, as a result of his many years of formal education, and his subsequent diligent continuing medical education, training and experience, Plaintiff Matthew

Brian Yoak is now a medical doctor licensed to practice medicine in the State of West Virginia and Ohio.

Beginning in July 2002, Dr. Yoak accepted a faculty position as Assistant Professor of Surgery at the Joan C. Edwards School of Medicine pursuant to a contract with the MUBG that ran from July 1, 2002 through June 30, 2003. Also in 2002, Dr. Yoak accepted a position on the Medical Staff of UP&S which ran concurrently with the MUBG contract. The contracts with MUBG and UP&S were renewed by separate agreements in 2003 and 2004 for similar periods running, cumulatively, from July 1, 2003 through 2005.

Specifically, by the terms of the contract titled NOTICE OF FACULTY APPOINTMENT, entered into on or about July 1, 2004, Plaintiff Matthew B. Yoak, M.D., agreed to provide a range of services, and the MUBG agreed to compensate him for those services in an amount of \$67,500.00 cash annually, exclusive of personal leave and reimbursement for continuing medical education and expenses related thereto.

Also, by the terms of the contract titled NOTICE OF MEDICAL STAFF APPOINTMENT, also entered into on or about July 1, 2004, Plaintiff Matthew B. Yoak, M.D., agreed to provide a range of services, and Defendant UP&S agreed to compensate him for those services, in an amount \$267,500.00, which excluded personal leave and reimbursement for continuing medical education and expenses related thereto.

The cumulative cash compensation Appellees agreed to pay Dr Yoak in his last year of employment was THREE HUNDRED FIVE THOUSAND DOLLARS (\$305,000.00).

MUBG and UP&S failed to perform material obligations to Plaintiff Yoak pursuant to the terms of the parties' contract. Specifically, Appellants repeatedly failed to live up to their obligations relating to the respective obligations of themselves and Dr. Yoak pertaining to

matters such as the burden of covering patients on holidays and weekends, and other non-monetary commitments. As a consequence of Defendants MUBG and UP&S failure to perform material obligations under their contract, Matthew B. Yoak elected to leave the school of medicine at mid-term.

Prior to November 17, 2004, the custom and usage in place at Defendants hospital was to accept faculty resignations on the dates specified by the faculty member resigning, and to allow the resigning faculty member to retain the ordinary cash and non-cash components of their compensation package through the resignation date. This custom and usage was implicitly acknowledged and tacitly approved, with minimal conditions, in the adoption of CSR § 133-9-8, which the parties explicitly incorporated into their contract.

On November 17, 2004, pursuant to the long standing custom and practice which permitted faculty members to resign mid-year without repercussions, Dr. Yoak submitted his resignation, effective December 31, 2004, to the Chairman of the Department of Surgery, Dr. David A. Denning.

On November 19, 2004, in an abrupt departure from the long standing custom and practice permitting mid-year faculty resignation, Dr. Denning rejected Dr. Yoak's December 31, 2004 resignation and summarily terminated his employment, effective December 3, 2004. As a result of this summary termination, Dr. Denning deprived Dr. Yoak of income for the period December 3, 2004 through December 31, 2004, an economic loss of approximately \$23,397.00.

Additionally, Dr. Denning retroactively recharacterized as annual leave many dozens of hours of previously approved continuing medical education, and ordered that Dr. Yoak's remaining salary be reduced by many thousands of dollars to reimburse Defendants for Dr.

Yoak's prior leave, and additional thousands of dollars of travel and other expenses related to Dr. Yoak's continuing medical education.

Regulations in effect on the date of Dr. Yoak's November 17, 2004 resignation governed the contract executed on behalf of Defendants MUBG and UP&S by Defendant Denning, and explicitly incorporated by reference all of the obligations specified in Code of State Regulations, Title 133, Series 9, Academic Freedom, Professional Responsibility, Promotion and Tenure.

These regulations were incorporated by page 2, par. D of the parties' contract, which recites that

This offer of appointment and all of the terms and conditions contained herein are subject to the provisions of West Virginia Higher Education Policy Commission Title 133, Procedural Rule Series 9 which is incorporated by reference.

See Exhibit A to Appellant's Response to Motion to Dismiss.

Title 133 recites in detail a myriad of rights guaranteed to Dr. Yoak, including, but not limited to, those recited in CSR §133-9-12 which contain the following pertaining to dismissal.

Principal among these rights was the specification of grounds for dismissal as follows:

12.1. **Causes for Dismissal:** The dismissal of a faculty member shall be effected only pursuant to the procedures provided in these policies and only for one or more of the following causes:

12.1.1. Demonstrated incompetence or dishonesty in the performance of professional duties, including but not limited to academic misconduct;

12.1.2. Conduct which directly and substantially impairs the individual's fulfillment of institutional responsibilities, including but not limited to verified instances of sexual harassment, or of racial, gender-related, or other discriminatory practices;

12.1.3. Insubordination by refusal to abide by legitimate reasonable directions of administrators;

12.1.4. Physical or mental disability for which no reasonable accommodation can be made, and which makes the faculty member unable, within a reasonable degree of medical certainty and by reasonably determined medical opinion, to perform assigned duties;

12.1.5. Substantial and manifest neglect of duty; and

12.1.6. Failure to return at the end of a leave of absence.

133 CSR § 133.9.12 (emphasis added).

Conspicuous by its absence as a ground for dismissal from the foregoing exclusive list of grounds for dismissal, is the long recognized practice of allowing faculty Doctors to resign mid-year without adverse consequences. However, mid-year resignation is addressed in a separate portion of the applicable regulations. Specifically, § 133.9.8, titled "Faculty Resignations," provides as follows:

8.1. A faculty member desiring to terminate an existing appointment during or at the end of the academic year, or to decline re-appointment, shall give notice in writing at the earliest opportunity. Professional ethics dictate due consideration of the institution's need to have a full complement of faculty throughout the academic year.

133 CSR § 133-9-8 emphasis added).

It is undisputed that Dr. Yoak gave notice of his intent to resign on November 17, 2004, some six weeks in advance of the proposed effective December 31, 2004, and no Defendant has alleged that this notice was not given "at the earliest opportunity" or that it adversely affected the institution's ability to field a full complement of faculty throughout the academic year.

Indeed, in their Motion to Dismiss, Defendants explicitly concede that "the majority of the time between December 3 and 31, 2004, the Plaintiff was not scheduled to be at work for the

Defendants,” See December 22, 2006 Motion to Dismiss, p. 2, at footnote 2 (emphasis added). This reality was presumably because of Dr. Yoak’s previously scheduled leave, which was forfeited by the summary dismissal and retroactive recharacterization of continuing medical education as personal leave.

In short, Defendants concede that they were not inconvenienced, even minimally, by Dr. Yoak’s November 17, 2004 mid-year resignation, and such a mid-year resignation was clearly carefully excluded from the exclusive list of items for which dismissal was appropriate. And, as noted, the custom and usage permitting such mid-year resignation was tacitly approved, with minimal notice requirements by § 13-9-8 noted above.

Apart from the grounds constituting cause for dismissal, § 133-9-1 et seq. recited detailed procedures for commencement and prosecution of an effort to dismiss personnel, including the following:

12.2. **Notice of Dismissal for Cause:** The institution shall initiate proceedings by giving the faculty member a written dismissal notice by certified mail, return receipt requested, which dismissal notice shall contain:

12.2.1. Full and complete statements of the charge or charges relied upon; and

12.2.2. A description of the appeal process available to the faculty member.

12.3. Prior to giving the faculty member a written dismissal notice, the institution shall notify the faculty member of the intent to give the written dismissal notice, the reasons for the dismissal, and the effective date of the dismissal. The faculty member shall have an opportunity to meet with the institutional designee prior to the effective date to refute the charges.

12.4. Faculty who refuse to sign or execute an offered annual contract or notice of appointment or reappointment by the date indicated by the

institution for its execution, or who fail to undertake the duties under such document at a reasonable time, shall be deemed to have abandoned their employment with the institution and any rights to tenure or future appointment. Faculty objecting to terms of such document do not waive their objections to such terms by signing or executing the document.

133 CSR § 133.9.12 (emphasis added).

David Denning's summary dismissal of Matthew Yoak on November 19, 2004 by-passed the foregoing mandatory procedures.

D. Facts Pertaining to Dr. Denning's Malicious Tortious Interference

Defendant David A. Denning's November 19, 2004 summary dismissal of Dr. Yoak on grounds of his mid-year resignation, and without employing the procedures outlined above, was patently illegal, was undertaken by Denning with full knowledge of its illegality and was in fact motivated by actual malice. To the extent that the tortious interference was undertaken with actual malice, Appellee Denning is not shielded by any claim of qualified immunity. Appellant properly alleged under the provisions of Rule 8, W. Va. R. Civ. P., permitting pleading in the alternative, that Dr. Denning acted outside the scope of his employment and with actual malice.

III. Assignments of Error

1. Did the Circuit Court err in dismissing Dr. Yoak's cause of action for misappropriation of identity, which unjustly enriched Appellees, where Appellant had invested many years of effort and thousands upon thousands of dollars developing a commercially valuable set of credentials, merely because the web page operated by MUBG had a disclaimer of liability for inaccuracy, or because the claim was "novel."

2. Did the Circuit Court err in dismissing, without any discussion whatsoever, Dr. Yoak's claim for personal and professional embarrassment resulting from MUBG's negligent publication of advertising that falsely claimed that Dr. Yoak was board certified in plastic surgery -- at a time when he was not -- thereby causing the accrediting agency sanctioned Dr. Yoak by delaying his board certification for one year.

3. Did the Circuit Court err in dismissing Plaintiff's Complaint for wrongful discharge:

A. Against UP&S, a private corporation not entitled to sovereign immunity on any grounds whatsoever.

B. Against state defendants on the ground of "qualified immunity" because Dr. Yoak's employment right did not involve "clearly established rights" which Defendants were on notice of, where:

(1) Dr. Yoak's rights are recited in detail in the provisions of Title 133, Code of State Regulations, Series 9, and

(2) the employment contract with Dr. Yoak, was personally signed by Dr. Denning on behalf of MUBG, and explicitly incorporated the provisions of Title 133, Code of State Regulations, Series 9.

C. On the doctrine of anticipatory breach -- a doctrine confined to fixing the timing of a suit and the measure of damages in a suit for breach of contract -- where:

(1) the custom and practice at MUBG and UP&S with regard to doctors' contracts in the past had been to accept resignations prior to contract termination, without imposition of any forfeiture of pay and benefits,

(2) the provisions of Title 133, Series 9, CSR, at § 133-9-8 explicitly acknowledge and tacitly approve the practice of mid-year resignation, and § 133-9-12 exclude mid-year resignation from the exclusive list of grounds for termination,

(3) MUBG and UP&S conceded that Dr. Yoak's November 17, 2004 resignation, effective December 31, 2004, in no way prejudiced their ability to perform medical obligations or fulfill teaching requirements, and

(4) Dr. Yoak alleged that MUBG and UP&S were in default of their contract with Dr. Yoak at the time of his resignation letter.

D. On the ground that Dr. Yoak failed to exhaust administrative remedies contained in a so-called "Green Book" where:

(1) the contract signed by the parties expressly incorporated procedures to deal with termination as provided in Title 133, Series 9, CSR.

(2) the parties' agreement explicitly provided that the provisions of Title 133, Series 9, CSR -- which includes no exhaustion of administrative remedies requirement -- would control in the event of an inconsistency between it and the so-called "Green Book"

(3) no "Green Book" or evidence of its adoption as an alternative to the provisions in Title 133, Series 9, CSR, was ever submitted as a part of the record in this proceeding below.

IV. Authorities Relied Upon

Cases

<i>Annon v. Lucas</i> , 155 W. Va. 368, 185 S.E.2d 343 (1971).....	32
<i>Brown v. Ames</i> , 201 F.3d 654 (5 th Cir. 2000).....	22
<i>Crump v. Beckley Newspapers, Inc.</i> , 173 W. Va. 699, 320 S.E.2d 70 (1983).....	16
<i>Curran v. Amazon.com, et al</i> , CA No. 2:07-0354.....	17
<i>Davis v. Grand Rapids Sch. Furniture Co</i>	31
<i>Downing v. Abercrombie & Fitch</i> , 265 F.3d 994 (9 th Cir. 2001).....	22
<i>ETW Corp. v. Jireh Pub., Inc.</i> 332 F.3d 915, 953 (6 th Cir. 2003), <i>Curran</i> , Slip Op. at 13.....	18
<i>Fayette County Bd. of Educ. v. Lilly</i> , 184 W. Va. 688 (W. Va. 1991).....	36
<i>Fayette County Nat'l Bank v. Lilly</i> , 199 W. Va. 349 (W. Va. 1997).....	23
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (U.S. 1982).....	27
<i>Hochster v. De la Tour</i> 118 Eng. Rep. 922 (Q.B. 1853).....	31
<i>James v. Adams</i> , 16 W. Va. 245, 266-67 (1880).....	31
<i>Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc.</i> , 694 F.2d 674, 676 (11 th Cir 1983).....	18
<i>Melvin v. Reid</i> , 112 Cal. App. 285, 297 P. 91 (1931).....	21
<i>Pancake v. George Campbell Co.</i> , 28 S.E. 719, 719-20 (W. Va. 1897).....	31
<i>Parkulo v. West Virginia Bd. of Probation</i> , 199 W. Va. 161, 483 S.E.2d 507 (1996).....	25
<i>Toney v. L'Oreal USA, Inc.</i> , 406 F.3d 905 (7 th Cir. 2005).....	22

Statutes

42 U.S.C. § 230 (f)(2) and (3).....	20
W. Va. Code § 29-6A.....	35

Other Authorities

<i>Not For Just Another Pretty Face: Providing Full Protection Under The Right Of Publicity</i> , 11 U. Miami Ent. & Sports L. Rev. 321, 326 (1994).....	21
William L. Prosser, <i>Privacy</i> , 48 Cal. L. Rev. 383, 384 (1960).....	22
Restatement of the Law, Third, Restitution and Unjust Enrichment (Tentative Draft No. 1, April 6, 2001).....	21
Restatement (Second) of Contracts, at Chapter 10 - Performance and Non-Performance, Topic 3 - Effect of Prospective Non-Performance, Section 253.....	33

V. Argument

A. Matthew B. Yoak's Allegation That MUBG and UP&S Appropriated His Identity For Commercial Purposes By Continuing to Use His Commercially Valuable Name, and Credentials, Without His Consent and Without Compensation, Unjustly Enriching MUBG and UP&S Long After Appellant Had Left Appellee's Employment, States A Cause of Action for Violation of the Right of Publicity.

Plaintiff has stated a cause of action for misappropriation of identity. Defendant MUBG and UP&S misappropriated his identity by publishing his name and credentials, which clearly had commercial value, and which Dr. Yoak has spent many years of work and effort building, and many, many thousands of educational dollars acquiring, without his consent -- from the date of his dismissal on December 3, 2004 at least through May 7, 2005 -- nearly six months after Dr. Yoak departed employment their employment. Dr. Yoak is entitled to compensation for the fair market value of that misappropriation under the doctrine of *quantum meruit* because of Appellants' unjust enrichment.

Although not fully developed in this jurisdiction, misappropriation of identity has been recognized. In *Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 320 S.E.2d 70 (1983), a libel case, this Court recognized a broad claim for invasion of privacy, which included misappropriation:

[I]n West Virginia, an "invasion of privacy" includes (1) an unreasonable intrusion upon the seclusion of another; (2) an appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public. See Restatement (Second) of Torts §§ 652A - 652E (1977).

Crump v. Beckley Newspapers, 173 W. Va. 699 (W. Va. 1983)(emphasis added).

The law of misappropriation of identity apparently received no further development in the state of West Virginia until less than one month ago, on February 19, 2008, when the Hon. John

T. Copenhaver, Jr., Senior Judge of the United States District Court for the Southern District of West Virginia issued his 39-page Memorandum Opinion and Order in *Curran v. Amazon.com, et al*, CA No. 2:07-0354. In *Curran*, relying upon *Crump*, Judge Copenhaver concluded that the West Virginia Supreme Court of Appeals would ultimately recognize a common law right of publicity:

Though the Supreme Court of Appeals has yet to definitively consider whether the common-law right [of publicity] exists in West Virginia, given the dicta in *Crump* and the general acceptance of the doctrine, the court concludes that a common-law right of publicity is cognizable in West Virginia.

Curran v. Amazon.com, et al, CA No. 2:07-0354, Slip. Op. at pp. 9-10.

In *Curran*, Getty Images, Inc. provided an image of a West Virginia National Guardsman to a publisher, St. Martin's Press, LLC, for use as a cover photo a book titled "Killer Elite," which was in turn sold by Amazon.com, Inc. Sideshow, Inc., Hot Toys LTD., and CAFEPRESS.com, Inc. also used the image in toys and tee shirts. Erik Curran, the Guardsman whose image was commercially exploited, and who had neither consented to the use of his image, nor been compensated for it use, by any of the foregoing entities, sued them all.

In rejecting the defendants' Rule 12 (b)(6) motions to dismiss Curran's claim for violation of his right to publicity, Judge Copenhaver noted that it was a state law claim and that, as of 2003, approximately half of the states had explicitly recognized the right by statute or at common law, with only a single U.S. jurisdiction (Puerto Rico) currently rejecting it. *Curran*, Slip Op. at 9. Concluding that West Virginia would recognize the cause of action, the Court observed that *Crump* was predicated on the "unjust enrichment caused by an unauthorized

exploitation of the good will and reputation that a public figure develops in his name or likeness through the investment of time, money and effort.” *Curran*, Slip Op. at 10.

Curran further noted that there was a split of authority over the requirement that a claimant be a “celebrity” with some courts restricting the claim to celebrities, *Martin Luther King, Jr. Center for Social Change, Inc. v. American Heritage Products, Inc.*, 694 F.2d 674, 676 (11th Cir 1983), and others holding that “non-celebrities” be permitted to recover upon proof that the appropriated identity possessed commercial value, and relegating the question of the claimant’s notoriety to the issue of damages rather than liability. *ETW Corp. v. Jireh Pub., Inc.* 332 F.3d 915, 953 (6th Cir. 2003), *Curran*, Slip Op. at 13. Without resolving the question of the necessity of an allegation of “celebrity,” the Court noted that Curran had not alleged that he was a celebrity, and granted the motion to dismiss without prejudice, stating that it would entertain the plaintiff’s motion to amend his Complaint to add the allegation.

In *Crump*, the West Virginia Supreme Court of Appeals held that the use of the plaintiff’s photograph did not constitute a misappropriation claim because:

the photograph was not published because it was *her* likeness, it was published because it was the likeness of a woman coal miner. *It was merely a file photograph* used as a matter of convenience *to illustrate an article on women coal miners*. This type of incidental use is not enough to make the publication of a person’s photograph an appropriation.

173 W. Va. at 715, 320 S.E.2d at 86 (emphasis added).

In the present case, Matthew Yoak’s claim is the opposite of that in *Crump*, i.e., Yoak claims that MUBG used his identity, precisely because his identity was associated with individual qualifications that would distinguish him from other doctors and, as a consequence of

that individual identification, cause patients to choose MUBG's medical facilities for their medical treatment, as opposed to MUBG's competitors.

This analysis should assist this Court in assessing the celebrity requirement. Plainly, Matthew Yoak has invested as much time, energy and effort as virtually any "celebrity" in the development of his professional identity, and the misappropriation of that identity by MUBG in an unmistakably commercial context, for the precise purpose of financial gain – without Yoak's consent or compensation to him – is the same unjust enrichment which Crump acknowledged as a ground for the claim appropriation of publicity. Indeed, given the frivolous ground for the claim to "celebrity" by many persons appearing in modern media, Dr. Yoak's years of medical training compare favorably, particularly in the market for which those skills were intended. In short, one can be celebrated in the commercial market for their profession skills, and entitled to the exclusive benefit of their years of work honing those skills, without being on the cover of People Magazine.

Appellees have attempted to down play the significance of their misappropriation of Matthew Yoak's identity by characterizing it as claim for negligently failing to update a web-page and asserting that Appellee's disclaimers on the same web page. Appellees state that the disclaimer clearly states that:

Information on the Marshall University Joan C. Edwards School of Medicine Web site is provided by faculty, staff, student and organizations. Although we strive to keep our Web information accurate and up-to-date, we cannot always guarantee accuracy. The School of Medicine is not to be held responsible for error or omissions in information provided via the Web site. Visitors to the School of Medicine site are responsible for contacting the appropriate person/department to verify information and should not rely on the information contained with the site.

Appellant's December 22, 2006 Motion to Dismiss at p. 9

Invoking this patently self-serving disclaimer, Appellees employing an *ipsa dixit*, simply assert that Appellant has failed to state a cause of action for misappropriation of identity. Judge Copenhaver discussion of *Knievel v. ESPN*, 393 F.3d 1068, (9th Cir. 2005), is germane to MUBG's effort to avoid liability by reference to self-serving disclaimers on web pages.

Although the issue arose in *Curran* in a very different context – distinguishing between “interactive computer services” and “information service providers” for purposes of determining the availability of affirmative defenses under the Communications Decency Act (CDA), 42 U.S.C. § 230 (f)(2) and (3) – Judge Copenhaver's comments are relevant here. In rejecting an argument that the “terms of service” page on a web site required a specific outcome under the CDA, Judge Copenhaver noted that

[A] user may visit a website frequently without ever viewing particular webpages of the given website. Thus, webpages from the same website do not necessarily provide a background or a context for other webpages found at that website. Rather, the relationship between webpages will depend on the configuration of the particular website.

Curran v. Amazon.com, et al, CA No. 2:07-0354, Slip. Op. at p. 34.

In short, there is no guarantee, or for that matter even a significant likelihood, that the alleged disclaimer would be read or considered by any, and certainly not all, persons, to whom MUBG directed the advertisements that appropriated Matthew Yoak's identity and his professional credentials. Moreover, the assertion that the misappropriation was inadvertent or otherwise excusable is not a defense that can be considered in the context of a motion to dismiss for failure to state a cause of action. That is a factual defense to be developed, if at all, at trial. It is enough here to note that intent has never been a requirement for recovery on *quantum meruit*

claims of unjust enrichment, the classic example being a builder's accidental construction of a house on the wrong parcel of real property.²

Apart from Judge Copenhaver's February 29, 2008 Memorandum Opinion and Order, the law on misappropriation generally has not stood still since 1983. In *Not For Just Another Pretty Face: Providing Full Protection Under The Right Of Publicity*, 11 U. Miami Ent. & Sports L. Rev. 321, 326 (1994), the author notes that misappropriation developed from the tort of invasion of privacy. The author relates that Samuel Warren and Louis Brandeis first proposed the tort of invasion of privacy in 1890 asserting that increased abuses by the press required a remedy upon "a distinct ground essential to the protection of private individuals against outrageous and unjustifiable infliction of mental distress." Warren and Brandeis suggested that the right of privacy protects a person's appearance, sayings, acts, and personal relations.

As early as 1931, California specifically recognized the right of privacy in *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931). The court in *Melvin* defined the right of privacy as "the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity. In short it is the right to be let alone."

In 1960, Dean Prosser noted that invasion of privacy had evolved into four distinct categories:

- a. Intrusion into a person's seclusion or solitude, or into his private affairs;
- b. Public disclosure of embarrassing private facts about the plaintiff;
- c. Publicity which places the plaintiff in a false light in the public eye, and

² See Restatement of the Law, Third, Restitution and Unjust Enrichment (Tentative Draft No. 1, April 6, 2001), Part II - Liability in Restitution, Chapter 2 - Transfers Subject to Avoidance Topic 1 - Benefits Conferred By Mistake § 10 Mistaken Improvements: "A person who improves the real or personal property of another, acting by mistake, has a claim in restitution as necessary to prevent unjust enrichment. A remedy for mistaken improvement that subjects the owner to a forced exchange will be qualified or limited to avoid undue prejudice to the owner."

d. Appropriation for the defendant's advantage of the plaintiff's name or likeness.

William L. Prosser, *Privacy*, 48 Cal. L. Rev. 383, 384 (1960).

Both the federal and state courts employ Prosser's four categories when deciding issues involving invasion of privacy. Specifically, in *Petty v. Chrysler Corp.*, 343 Ill. App. 3d 815, 826 (Ill. App. Ct. 2003) the Court held as follows:

Misappropriation of identity is a tort arising from the right to privacy and is designed to prevent the commercial use of one's name or image without consent. *Ainsworth v. Century Supply Co.*, 295 Ill. App. 3d 644, 648, 693 N.E.2d 510, 230 Ill. Dec. 381 (1998). To plead misappropriation of identity, the plaintiff must claim "an appropriation without consent, of one's name or likeness for another's use or benefit." *Dwyer v. American Express Co.*, 273 Ill. App. 3d 742, 748, 652 N.E.2d 1351, 210 Ill. Dec. 375 (1995). A claimant alleging misappropriation of identity need not prove actual damages, because the court will presume damages if someone infringes another's right to control his identity. *Ainsworth*, 295 Ill. App. 3d at 650.

Petty v. Chrysler Corp., 343 Ill. App. 3d 815, 826 (Ill. App. Ct. 2003).

The Fifth, Seventh and Ninth U.S. Circuit Courts of Appeal have all recognized the tort of misappropriation of identity. In *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir. 2001), the plaintiffs were former surfing competitors whose photographs—taken at a 1965 surfing competition—were used in an Abercrombie & Fitch clothing catalog without the plaintiffs' permission.

In *Brown v. Ames*, 201 F.3d 654 (5th Cir. 2000), several musicians and songwriters brought claims for the tort of misappropriation—which the court described as a "species of the right of publicity or of privacy"—against a record label and music producer for using their names and likenesses on cassettes, compact discs, catalogs, posters and videotapes without their permission.

And *Toney v. L'Oreal USA, Inc.*, 406 F.3d 905 (7th Cir. 2005), involved a model's claim for the unauthorized use of her photograph in connection with the packaging and promotion of a hair product.

The Circuit Court's opinion offers no reason to believe that West Virginia will not join the list of states fully implementing the tort of misappropriation of identity. In light of Judge Copenhaver's ruling, mere novelty is not a sufficient defense under Rule 12(b)(6) to a claim of misappropriation of identity in this jurisdiction.

B. The Circuit Court erred in dismissing -- without any discussion whatsoever -- Dr. Yoak's claim for MUBG's negligently publishing advertisements claiming inaccurately that Dr. Yoak was board certified in plastic surgery -- at a time when he was not -- which caused the accrediting board to delay Dr. Yoak's accreditation for one year thereby subjecting him to continuing personal and professional embarrassment.

Separate from, and totally independent of Appellant's claims for misappropriation of identity, or summary dismissal from employment, Appellant has alleged damage to his reputation as a result of the negligent claim by MUBG that Plaintiff was board certified in plastic surgery at a time when he was not. This negligence delayed by one-year the Plaintiff's certification by that board; and he has alleged damages as a result of that negligence.

The May 23, 2007 Order does not mention this separate cause of action. This resulted, in part, because of the Appellees' strategic decision to conflate Appellant's causes of action in their pleadings before the Circuit Court. The result, however, is an order that -- at least with regard to this particular count³ -- does not satisfy the requirements of appellate review. See Syl. Pt. 3, *Fayette County Nat'l Bank v. Lilly*, 199 W. Va. 349 (W. Va. 1997) ("Although our standard of review for summary judgment remains de novo, a circuit court's order granting summary

judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed”).

C. The dismissal of Plaintiff’s Complaint against UP&S, a private corporation not entitled to any immunity whatsoever, on the grounds of qualified immunity, was error.

Dr. Yoak’s Complaint explicitly averred in Par. 6 that “Defendant UNIVERSITY PHYSICIANS AND SURGEONS, INC. (hereafter “UP&S”) is a privately-held, for-profit, West Virginia corporation with its principal place of business in Cabell County, West Virginia, and, on information and belief, actually does business in Kanawha County, West Virginia.” UP&S filed no pleading contesting this allegation, and under Rule 12 (b) (6) it must be accepted as true in any event.

UP&S’s assertion in their Response to Petition for Appeal filed in this proceeding that Yoak waived the argument pertaining to lack of sovereign immunity by failing to raise it in his opposition to the motion to dismiss before the Circuit Court, is disingenuous. Yoak’s entire argument on pages 7 and 8 of his February 13, 2007 opposition obviously assumed, as his Complaint explicitly alleged, that UP&S was a private corporation. It is beyond cavil that private corporations do not enjoy sovereign immunity. The point is very simple – why would one need to argue the obvious legal proposition that sovereign immunity was reserved to governmental agencies. The assertion was, at the very least, implicit in the discussion of UP&S in terms of breach of contract without ever once referencing sovereign immunity.

³ Counsel for Appellant explicitly acknowledged below, and reiterates here, that Judge Pancake’s careful dictation of a ruling from the bench on February 17, 2007, constituted in all other respects a model of compliance with *Fayette County Nat’l Bank*. See Transcript of Proceedings on February 17, 2007, pp. 30-41.

Moreover, no theory of law was ever asserted below for exempting UP&S from liability under its contract with Plaintiff by virtue of any claim of sovereign immunity, and no ground for such an assertion is found in the May 23, 2007 order dismissing Plaintiff's Complaint against UP&S. UP&S's effort to concoct a rationale in its Response to Petition for Appeal consists of nothing more than a quotation from the parties' private contract reciting the services UP&S provided to MUBG followed by the *non-sequitor* that, because of those services, UP&S was transformed from a private corporation, registered with the Secretary of State, into "an instrumentality of the State." Regardless of the analysis in the latter portions of this Petition pertaining to state sovereign immunity statutes, UP&S is a private corporation subject to suit, like any other corporation, for its obligations to Plaintiff.⁴

With regard to termination, the UP&S contract with Dr. Yoak, provides merely that "Separation from the medical staff of UP&S will occur upon separation of the faculty member from the Medical School and will be non-discretionary upon any such separation from the Medical School." The legality of the separation of Dr. Yoak from the Medical School faculty therefore depends upon the legality of the action by MUBG.

The two contracts Dr. Yoak signed with the Medical School and with UP&S thus depend on each other for a determination of legality, but there is nothing in the parties' contracts or any law that transfers, or lends, to UP&S any immunity from suit, or other umbrella from liability, such as that extended (erroneously, in Dr. Yoak's view, for the reasons set forth below) to the MUBG by the Circuit Court's opinion.

⁴ The assertion of counsel that UP&S is a non-profit v. a profit corporation in no way alters the sovereign immunity analysis, even if this Court could take judicial notice of matters outside the record that happen to appear on a state-sponsored web site.

If Dr. Denning's November 19, 2004 summary dismissal of Dr. Yoak from the staff of the Medical School was unlawful, UP&S is not insulated from the impact of that illegality, even if MUBG is immune from suit. Nonetheless, the May 23, 2007 Order dismissing Dr. Yoak's Complaint against UP&S recites simply that "the agency for which the employee or office worked ordinarily – but not always – enjoys qualified immunity coterminous with, or of equal effect to, that enjoyed by the officer or employee," citing *Parkulo v. West Virginia Bd. of Probation*, 199 W. Va. 161, 177-8, 483 S.E.2d 507, 523-4 (1996)(emphasis added). Slip Op. at p. 6. And in its **RULING** paragraph, the Circuit Court held that: "The Plaintiff has named David A. Denning, M.D. in his individual capacity and the Marshall University Board of Governors and UP&S in this action. All Defendants are entitled to qualified immunity from suit because these Defendants have not violated a specifically identified statute." Slip Op. at 12.

Nothing in *Parkulo* suggests, even remotely, that a private corporation, no matter how closely its operations may be intertwined with that of a state agency, enjoys by judicial osmosis the right of sovereign immunity which, by definition, is confined to state actors. The contrary holding of the Circuit Court is clear error. Moreover, as will be demonstrated below, MUBG's claim to sovereign immunity, based upon the purported qualified immunity of Dr. Denning, is equally lacking in basis.

D. The Circuit Court erred in holding that MUGB and Dr. Denning were entitled to qualified immunity -- because Plaintiff had not alleged violation of any "clearly established rights" -- where the parties' contract expressly incorporated the employee rights of notice and an opportunity to be heard, recited in Title 133, Series 9, CSR.

In Paragraph 15 of his Complaint, Dr. Yoak explicitly alleged that Title 133, Series 9, entitled "Academic Freedom, Professional Responsibility, Promotion and Tenure," governed the contract entered into by MUBG and Dr. Yoak. In Paragraph 16 of his Complaint, Dr. Yoak

recited verbatim the provisions of CSR § 133-9-12 which provide in 12.1 a comprehensive list of causes for dismissal (none of which include resignation prior to termination of a contract term), and which require in 12.2 written notice, by certified mail, return receipt requested, of a full statement of the charges, the procedure, and an opportunity to meet and refute charges.

Paragraph 17 of Dr. Yoak's Complaint provides as follows:

17. On November 19, 2004, in derogation of the custom and practice uniformly applied in prior faculty resignations, and in violation of state regulations and the parties' contract, Defendant David A. Denning unlawfully rejected Plaintiff's resignation and, without cause, notice or compliance with applicable procedures, dismissed Plaintiff from employment by MUBG and UP&S effective December 3, 2004, causing Dr. Yoak to lose wages in an amount to be proved at trial.

Complaint, Par 17 (emphasis added)

Exhibit A to Dr. Yoak's Response to the Rule 12 (b)(6) Motion to Dismiss in this case consists of Title 133, Series 9, entitled "Academic Freedom, Professional Responsibility, Promotion and Tenure," and recites in detail the myriad rights guaranteed to Dr. Yoak and are expressly incorporated into the parties contract signed by Dr. Denning.

Exhibit B to Dr. Yoak's Response to the Rule 12 (b)(6) Motion to Dismiss was the contract between defendants and plaintiff, and at page 2, paragraph D, provides in pertinent part that:

This offer of appointment and all of the terms and conditions contained herein are subject to the provisions of West Virginia Higher Education Policy Commission Title 133, Procedural Rue Series 9 which is incorporated by reference.

Exhibit B, page 2, par. D (emphasis added).

Dr. Denning signed this contract personally and cannot plausibly deny knowledge of the existence of rights of employees which have already worked their way into the boiler plate of every faculty employee contract he signs.

The plain language of the Plaintiff's Complaint directly and unambiguously contradicts the holding in the May 23, 2007 Order of dismissal, that "The Plaintiff has not alleged that the Defendants' actions violated any clearly established statutory or constitutional rights of which a reasonable person in Dr. Denning's position would have known about." Slip Op. at 4.

Nothing in the law of "clear rights" even remotely supports the Circuit Court's holding in this case. As *Parkulo* itself readily acknowledged, the qualified immunity rule for public executive officials, was "drawn from *Chase*, from civil rights cases, and from *Bennett v. Coffman*. *Parkulo v. West Virginia Bd. of Probation & Parole*, 199 W. Va. 161 (W. Va. 1996)

The leading civil rights case creating the qualified immunity doctrine was *Harlow v. Fitzgerald*, *Harlow v. Fitzgerald*, 457 U.S. 800 (U.S. 1982) in which the U. S. Supreme Court noted that changing laws might catch unsuspecting government officials unaware of their obligations at the time a particular action was taken in good faith ignorance of where unfolding litigation might go:

If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed. If the law was clearly established, the immunity defense ordinarily [*819] should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant

legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.

Harlow v. Fitzgerald, 457 U.S. 800, 819 (U.S. 1982)(emphasis added).

One can only conclude that Dr. Denning was not aware of his obligations under Title 133, Series 9, which were explicitly incorporated into the contract he personally signed, only by reference to highly subjective factors, none of which are appropriate in the context of a motion to dismiss under Rule 12 (b)(6) which has otherwise adequately pled knowledge and provided a credible, objective basis for those allegations.

In no circumstances, however, could a claim of ignorance trump allegations of knowing violation of the law. As *Harlow* clearly provides:

By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action.

Harlow v. Fitzgerald, 457 U.S. 800 (U.S. 1982)(emphasis added)

In the present case, Plaintiff provided all of the allegations of knowledge and malice required by *Harlow* or *Parkulo*. The May 23, 2007 Order of dismissal readily acknowledges that:

The Plaintiff does allege that these “Defendants acted “unlawfully, and without justification or compliance with applicable procedure.” See Complaint at ¶¶ 14, 15, and 16. The Plaintiff also alleges that these Dr. Denning’s actions “were taken with full knowledge of their illegality and were motivated by actual malice.” Complaint at ¶ 17.

May 23, 2007 Slip Op. at p. 4 (emphasis added).

The finding that Plaintiff alleged no violation of clearly established rights is patently erroneous. And *Parkulo* makes plain that Denning's malicious actions, outside the scope of his employment, are not shielded by qualified immunity. Syl Pt. 8. *Parkulo v. West Virginia Board Of Probation And Parole*, 199 W. Va. 161, 483 S.E.2d 507 (1996) ("There is no immunity for an executive official whose acts are fraudulent, malicious, or otherwise oppressive.")

E. The Circuit Court erred in finding that Dr. Yoak's November 2004 notice of intent to resign effective December 31, 2004 -- in advance of the June 30, 2005 termination of his contract on June 30, 2004 -- constituted an anticipatory breach of contract, justifying Defendants resort to self-help and the summary dismissal of Dr. Yoak from employment.

1. The doctrine of anticipatory breach does not apply where the Plaintiff has alleged that the custom and practice of the MUBG at its School of Medicine routinely allowed professors to resign early without forfeiture of pay and/or benefits.

Title 133, Series 9, in addition to providing for notice and an opportunity to be heard, also lists all of the grounds for dismissal. Those grounds include:

12.1.1. Demonstrated incompetence or dishonesty in the performance of professional duties, including but not limited to academic misconduct;

12.1.2. Conduct which directly and substantially impairs the individual's fulfillment of institutional responsibilities, including but not limited to verified instances of sexual harassment, or of racial, gender-related, or other discriminatory practices;

12.1.3. Insubordination by refusal to abide by legitimate reasonable directions of administrators;

12.1.4. Physical or mental disability for which no reasonable accommodation can be made, and which makes the faculty member unable, within a reasonable degree of medical certainty and by reasonably determined medical opinion, to perform assigned duties;

12.1.5. Substantial and manifest neglect of duty; and

12.1.6. Failure to return at the end of a leave of absence.

Title 133, CSR, § 133-9-12.

Mid-year resignation is conspicuously absent from the list of causes for dismissal. Indeed, early resignation is dealt with in a separate section, 133-9-8, entitled “Faculty Resignations” and which provides in its entirety as follows:

A faculty member desiring to terminate an existing appointment during or at the end of the academic year, or to decline re-appointment, shall give notice in writing at the earliest opportunity. Professional ethics dictate due consideration of the institution’s need to have a full complement of faculty throughout the academic year.

Title 133, CSR, § 133-9-8.

Although this provision may be said to have no small moral significance, MUBG, in a footnote to its Motion to Dismiss, freely conceded that Dr. Yoak in no way inconvenienced MUBG by leaving prior to the end of his term. Indeed, the footnote states that: “...the majority of the time between December 3 [the effective date of Dr. Denning’s summary dismissal of Dr. Yoak] and [December] 31, 2004, the Plaintiff was not scheduled to be at work for the Defendants.” Motion at p. 2, n.2.

Manifestly, no claim of inconvenience can be raised under Section 133-9-8 pertaining to faculty resignations, nor has any party alleged that the six-week notice provided by Dr. Yoak’s November 17, 2004 was not the “earliest opportunity” notice requested by Section 133-9-8, a factual matter which in any event would be resolved by a jury.

More importantly, however, Section 133-9-8 by implication at the very least confirms the allegation in Plaintiff’s Complaint – which Rule 12(b)(6) required the Circuit Court to accept as

true -- that the custom and usage at the School of Medicine operated by MUBG was to permit faculty to leave mid-year without forfeiture of pay and benefits.

In short, early resignation was never a firing offense, certainly not under the controlling regulations explicitly incorporated into the parties' contract, and therefore cannot constitute a ground for a finding of anticipatory breach which would permit Dr. Yoak's dismissal under Title 133, Section 9. As noted in the next section, it also did not authorize Dr. Denning's resort to self-help and summary dismissal by fiat which, like all other facts Dr. Yoak alleged, must be deemed to have been committed with actual malice.

2. *The doctrine of anticipatory breach only addresses the timing of court action by an injured party, and the measure of damages, but does not authorize self-help, particularly where the self-help employed -- dismissal from employment of a public employee -- is governed by a highly developed law expressly incorporated into the parties' agreement, and readily available to MUBG and Denning.*

The doctrine of anticipatory breach is, as this Court has observed,⁵ derived from the common law, with its beginning usually traced to *Hochster v. De la Tour* 118 Eng. Rep. 922 (Q.B. 1853), where it was held that:

[t]he man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued . . . by the man whom he has injured: and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer.

Id. at 927.

⁵ See *Pancake v. George Campbell Co.*, 28 S.E. 719, 719-20 (W. Va. 1897); *Davis v. Grand Rapids Sch. Furniture Co.*, 24 S.E. 630, 631 (W. Va. 1896); *James v. Adams*, 16 W. Va. 245, 266-67 (1880).

The critical requirement that an injured party resort to court, in some fashion and some time, is reinforced in the principal case relied upon below by respondents and cited in the Circuit Court's May 23, 2007 Order of dismissal. In *Annon v. Lucas*, 155 W. Va. 368, 185 S.E.2d 343 (1971), this Court held that an party injured by an anticipatory breach had three options:

He may treat the contract as rescinded, and recover on quantum meruit so far as he has performed; or he may keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform, and at the end of the time specified in the contract for performance, sue and recover under the contract; or he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits he would have realized, if he had not been prevented from performing.

155 W.Va. 379, 185 S.E.2d 350(emphasis added).

The plain language of each of these three options contemplates the party alleging injury to resort to the court room; the only distinction between them is the *timing* of that court action. Nothing remotely suggests that a party claiming injury has the right to by-pass the court room and resort to self-help. That is particularly the case where, as here, precise regulatory mechanisms are expressly incorporated into the parties' contract that deal specifically with the purported grounds for and procedure for termination. Nothing in Dr. Yoak's November 17, 2004 letter of resignation can fairly be characterized as waiving any of his rights under his contract, and particularly not those pertaining to grounds for termination.

The Restatement (Second)⁶ of Contracts, at Chapter 10 - Performance and Non-Performance, Topic 3 - Effect of Prospective Non-Performance, reviews in detail the topic of anticipatory breach. Section 253 of the Restatement recites the rules for anticipatory breach as follows:

§ 253 Effect of a Repudiation as a Breach and on Other Party's Duties

(1) Where an obligor repudiates a duty before he has committed a breach by non-performance and before he has received all of the agreed exchange for it, his repudiation alone gives rise to a claim for damages for total breach.

(2) Where performances are to be exchanged under an exchange of promises, one party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance.

Comment *b* to § 253, entitled "*Discharge*" provides that under Subsection (1) a breach by repudiation alone can only give rise to a claim for total breach, although a breach by non-performance, even if coupled with a repudiation, can generally give rise to either a claim for partial breach or to one for total breach (§§ 236, 237). . . . Subsection (2) states a corollary of this rule that a breach by repudiation always gives rise to a claim for damages for total breach: where performances are to be exchanged under an exchange of promises, one party's repudiation discharges any remaining duties of performance of the other party with respect to the expected exchange.

Illustrations 1 and 2 demonstrate the manner in which the above rules apply in concrete examples:

Illustrations:

1. On April 1, A and B make a contract under which B is to work for A for three months beginning on June 1. On May 1, A repudiates by telling B he will not employ him. On May 15, B commences an action against A. B's duty to work for A is discharged and he has a claim against A for damages for total breach.

⁶ This Court expressly approved the Section 322 of the first Restatement of the Law of Contracts, which dealt with anticipatory breach, in *Annon v. Lucas*, 155 W. Va. at 379, 185 S.E.2d at 351

2. On July 1, A contracts to sell and B to buy a quantity of barrel staves, delivery and payment to be on December 1. On August 1, A repudiates by writing B that he will be unable to deliver staves at the contract price. On September 1, B commences an action against A. B's duty to pay for the staves is discharged and he has a claim against A for damages for total breach. See Uniform Commercial Code § 2-610.

In each of the foregoing instances, the only questions are the timing of the injured party's action and the measure of damages to be applied in such circumstances: Nothing, including the section dealing with reciprocal duties, suggests that self-help, in the form of affirmative relief such as summary dismissal, are authorized. At most, Section 2 merely relieves the injured party from future performance.

Here, the remedy specified in the parties' contract was that spelled out in Title 133, Section 9. If MUBG and Dr. Denning wished to proceed with a dismissal of Dr. Yoak on any terms other than those he proposed in his November 17, 2004 letter of resignation, their method for doing so was laid out for them in the laws of this state. Nothing in the decided cases of this jurisdiction warrant the disregard of lawful process, and the resort to self-help employed, with malice, by Dr. Denning.

F. The Circuit Court erred in finding that Dr. Yoak failed to exhaust administrative remedies contained in a so-called "Green Book" which was never admitted to the record in the proceedings below.

The July 1, 2005 to June 30, 2005 contract signed by Dr. Yoak and Dr. Denning, on behalf of MUBG and UP&S expressly incorporated procedures to deal with termination as provided in Title 133, Series 9, CSR. As noted above, those procedures provide for notice, an

opportunity to be heard. The contract further explicitly provided that any conflict between Title 133 and the "Green Book" would be resolved in favor of the provisions of Title 133:

In the event any inconsistencies exist between this notice of appointment, the "Greenbook" and West Virginia Higher Education Policy Commission Title 133, Procedural Rule Series 9, the provisions of the West Virginia Higher Education Policy Commission Title 133, Procedural Rule Series 9 take precedence over those contained herein or elsewhere.

Exhibit B to Plaintiff's February 13, 2007 Opposition to Motion to Dismiss.

Title 133 includes no exhaustion requirement. Thus, to the extent that the "Green Book" includes any exhaustion requirement, it is by virtue of its inconsistency, expressly written out of the parties' contract. Accordingly, Appellees' argument based upon exhaustion has no merit.

Moreover, no "Green Book" or evidence of MUBG's adoption of it or any other alternative to the provisions in Title 133, Series 9, CSR, was ever submitted as a part of the record in this proceeding below. Nor are the contents of any "Greenbook," or the fact of its adoption, matters of public record such that the Circuit Court or this Court may take judicial notice of them.

W. Va. Code § 29-6A, in effect at the time of Dr. Yoak's resignation, expressly exempted from its requirements for grievance procedures "employees of the board of regents and state institutions of higher education." It is immaterial that 133-9-16.1 provides that an institution could adopt regulations other than those specified in W.Va.Code § 29-6A; there is nothing in the record to support the proposition that MUBG did so, and the incorporation of Title 133, Series 9, with its provisions of the exclusive grounds and mandatory procedure for dismissal contradicts the proposition that any other procedure was required or employed.

To be sure, MUBG cannot be heard to complain of Dr. Yoak's failure to exhaust administrative remedies, where Dr. Denning's resort to self-help patently flouted the law requiring MUBG to follow administrative procedures governing dismissal. Given the allegations of actual malice here, any such grievance procedure would have been futile and therefore not required. *Fayette County Bd. of Educ. v. Lilly*, 184 W. Va. 688 (W. Va. 1991), Syl. Pt. 1 ("The doctrine of exhaustion of administrative remedies is inapplicable where resort to available procedures would be an exercise in futility. Syl. Pt. 1, *State ex rel. Bd. of Educ. v. Casey*, 176 W. Va. 733, 349 S.E.2d 436, 437 (1986).

And Dr. Yoak was not required to resort to administrative remedies to remedy his claim that MUBG breached its obligations to him; under the custom and usage at the hospital, he could simply "vote with his feet" and depart without forfeiture of pay or benefits, a practice explicitly recognized and tacitly approved in Title 133 CSR § 133-9-8.

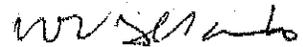
VI. Relief

The May 23, 2007 Order dismissing Dr. Yoak's Complaint with prejudice under Rule 12 (b)(6) should be reversed and the matter remanded for a trial on the merits.

Respectfully submitted,

MATTHEW BRIAN YOAK

By Counsel



William V. DePaulo, Esq. #995
179 Summers Street, Suite 232
Charleston, WV 25301
Tel: 304-342-5588
Fax: 304-342-5505
william.depaulo@gmail.com

VII. Certificate of Service

I hereby certify that a copy of the BRIEF OF APPELLANT was mailed, postage prepaid, to counsel of record at the addresses indicated below, on this 17th day of March, 2008:

Vaughn T. Sizemore, Esq. #8231
Bailey & Wyant, PLLC
500 Virginia Street, E., Suite 600
P. O. Box 3710
Charleston, WV 25337-3710
Tel: 304-345-4222



William V. DePaulo #995