

APPEAL NO. 33863

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

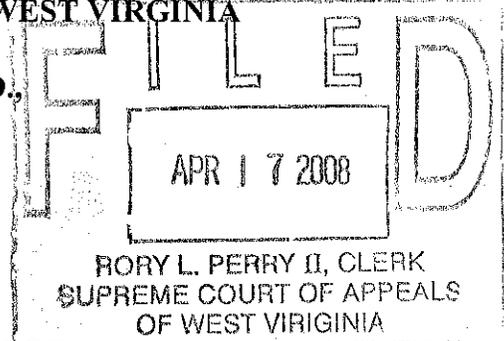
MATTHEW BRIAN YOAK, M.D.

Appellant,

v.

MARSHALL UNIVERSITY BOARD OF
GOVERNORS; UNIVERSITY PHYSICIANS AND
SURGEONS, INC.; and DAVID A. DENNING, M.D.

Appellee.



APPELLEE BRIEF

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COME NOW the Appellees, Marshall University Board of Governors (individually referred to as “Marshall University”), University Physicians and Surgeons, Inc (“UP&S”), and David A. Denning, M.D. (Collectively “Marshall” or “Appellees”), by counsel Charles R. Bailey, Vaughn T. Sizemore, and the law firm of Bailey & Wyant, P.L.L.C., and for their Appellee Brief states as follows:

I. INTRODUCTION

The Petitioner raises three issues for appeal, with additional subparts, and subparts to the subparts under one of the issues. As will be more fully outlined below, the Cabell County Circuit Court correctly granted the Appellees’ Motion fo Dismiss. The Court cited multiple reasons for granting the Motion, any of which alone would be sufficient to uphold the Court’s ruling, but taken together, these reasons demonstrate that this Court should affirm its decision. The Court ruled that the Appellees were entitled to qualified immunity from suit, that the Appellant failed to state a cause of action upon which relief may be granted on each of his claims, and that the Appellant failed to exhaust his administrative remedies before filing suit.

The Appellant attempts to hold the Appellees liable for the failure to remove his name from the Marshall University web site upon his termination. While the Appellant argues that this Court has recognized a cause of action for invasion of privacy, the Circuit Court correctly found that qualified immunity would apply to this claim because a reasonable public official in the position of Dr. Denning would not know that this failure would subject him to liability where this Court has never recognized a cause of action for misappropriation of identity. Finally, the Appellant’s claims for negligent publishing of advertising were also covered by Circuit Court’s finding of an entitlement to qualified immunity.

Next, the Appellant argues in his appeal that Appellee University Physicians and Surgeons (“UP&S”) is not entitled to qualified immunity because it is a private for profit corporation. He correctly assesses his contract with UP&S as being dependant upon his continued appointment to the Marshall University faculty. However, he ignores the fact that his appointment with UP&S was made by the authority of and subject to the legal authority of West Virginia law. As such, UP&S was operating as an instrumentality of the State. Thus, UP&S is entitled to qualified immunity as because it was legally part of the State. Further, if the dismissal from Marshall was appropriate, then the Petitioner’s appointment with UP&S ended by the terms of the appointment itself, terms to which the Appellant agreed.

The Appellant also alleges that he cannot be required to exhaust the administrative remedies contained in the Marshall University “Green Book”. However, the Court had every right to consider the “Green Book” along with the West Virginia Code and the Code of State Regulations because the “Green Book” is the administrative procedures adopted by Marshall University in accordance with W.Va. Code § 29-6A-1 *et seq.* and is specifically incorporated into the contract.¹ Finally, the Appellant’s breach of his employment contract allowed the Appellees to immediately rescind it. Therefore, the Cabell County Circuit Court correctly granted the Appellees’ Motion to Dismiss.

¹ The “Green Book” effective during the time in question is available at <<http://www.marshall.edu/academic-affairs/The%20Greenbook/The-Greenbook%20August%202003R10-7.pdf>>. The section dealing with the grievance rights of a faculty member is identical to 133 C.S.R. §9-15.1 *et seq.* It also explicitly states: “Procedures for hearing faculty grievances are established in West Virginia State Code Chapter 29, Article 6A.”

II. STATEMENT OF CASE

a. NATURE OF PROCEEDING AND RULING BELOW

The Appellant originally filed this action in Kanawha County on May 9, 2005. The Appellees filed a Motion to Dismiss based on improper venue, failure to provide statutorily required pre-suit notice, qualified immunity, and failure to state a claim upon which relief may be granted. On July 14, 2006, the Court entered an Order granting the Appellees' Motion on all grounds and dismissing the action with prejudice. The day after the August 24, 2005, the Appellant filed a Motion to Amend Complaint and an Amended Complaint. After the Order was entered dismissing the action, the Appellant filed a Motion for Relief from Judgment arguing that the dismissal should have been without prejudice because granting the Motion to Dismiss based on failure to provide pre-suit notice deprived the Court of jurisdiction over the other arguments. The Court agreed with the Appellant, and on October 17, 2006, the Court entered an Order dismissing the action without prejudice.

On October 23, 2006, the Appellant filed a new action in the Kanawha County Circuit Court. After consultation between the Appellant and Appellees counsel, and the threat of yet another Motion to Dismiss for improper venue under W.Va. Code § 14-2-2a and failure to provide appropriate pre-suit notice under W.Va. Code §§ 55-17-1 *et seq.*, the parties agreed that the Defendants would waive their defense of failure to provide appropriate pre-suit notice if the Appellant would voluntarily agree to a transfer to the appropriate venue of Cabell County. On December 12, 2006, the Court granted a joint Motion to Transfer, and the case was transferred to Cabell County. The Defendants then filed their Motion to Dismiss on December 22, 2006. The court issued a ruling from the bench during a February 15, 2007 hearing and then entered a written

order granting the Appellant's Motion to Dismiss on May 23, 2007. It is this Order that is the subject of this Petition for Appeal.

The Appellant's Complaint alleged a breach of contract against Marshall University Board of Governors, a breach of contract against UP&S, negligence against Marshall University, and tortious interference with a contract against Denning. He also alleges entitlement to relief under a theory of quantum meruit under a theory of misappropriation of identity based on the fact that his name was listed on the Marshall University website. As will be detailed below, the district court was correct when it granted the Appellees' motion to dismiss.

b. STATEMENT OF FACTS²

As alleged in the Complaint, the Appellant is a medical doctor who resides in Williamstown, West Virginia. See Complaint at ¶ 4. He was appointed as an Assistant Professor of Surgery at the Joan C. Edwards School of Medicine ("SOM") in July, 2002. See id. at ¶ 10. His initial appointment ran from July 1, 2002 to June 30, 2003. See id. In addition to the appointment with the SOM, the Appellant received an appointment to practice medicine with

² The Appellees conceded the facts alleged in the Plaintiff's Complaint solely for the purpose of the Motion to Dismiss. However, the Appellee did not accept Appellant's legal conclusions.

University Physicians & Surgeons (“UP&S”).³ See id. These appointments were renewed annually, up to and including, an appointment from July 1, 2004 to June 30, 2005. See id.

On November 17, 2004, the Appellant submitted his letter of resignation to both the SOM and UP&S. See id. at ¶ 13. This notice constituted a breach of any employment contract between the Appellant and the Appellees. On November 19, 2004, the Appellees chose to terminate the Appellant’s employment effective December 3, 2004, rather than December 31, 2004, as suggested by the Appellant. See Complaint at ¶ 17. The Appellant alleges these actions were unlawful and without justification. He further alleges that Dr. Denning’s actions “were taken with full knowledge of the illegality and were motivated by actual malice.” Complaint at ¶ 17.

The Appellant’s Brief lists a statement of facts for each of the claims in his Brief. Many of these facts are not relevant to the basis relied upon by the circuit court in granting the Appellees’ Motion to Dismiss. The Appellant submits that “[u]nder the long standing decisions of this Court, all of the facts derived from Plaintiff’s Complaint, and Plaintiff’s representations incident to his opposition to Defendants’ motion to dismiss, are assumed to be true for purposes of a Rule

³ The contract to practice with UP&S states:

As the faculty practice plan of the School of Medicine, UP&S does not select medical staff members, but appoints to the medical staff individuals who are selected and engaged as faculty members by the Medical School. UP&S does not engage in the practice of medicine, but functions as an administrative service providing clinical spaces and support staff and billing, collection and payroll services. Separation from the medical staff of UP&S will occur upon separation of the faculty member from the Medical School and will be non-discriminatory upon any such separation from the Medical School

Exhibit B, of the Plaintiff’s Response to Motion for Summary Judgment.

12(b)(6) motion.” In support of this proposition, the Appellant cites to Longwell v. Board of Educ. of County of Marshall, 213 W.Va. 486, 583 S.E.2d 109 (2003). The actual language of Longwell is:

This case is before this Court on appeal from an order of the circuit court granting the BOE's motion to dismiss under W. Va. R. Civ. P. 12(b)(6).

“Appellate review of a circuit court's order granting a motion to dismiss a complaint is de novo.” Syl. pt. 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995). In conducting our de novo review, we are mindful that

“ “The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint 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.” Syl., Flowers v. City of Morgantown, 166 W.Va. 92, 272 S.E.2d 663 (1980).’ Syl. pt. 2, Sticklen v. Kittle, 168 W.Va. 147, 287 S.E.2d 148 (1981).” Syllabus, Fass v. Newsco Well Service, Ltd., 177 W.Va. 50, 350 S.E.2d 562 (1986).

Syl. pt. 2, West Virginia Canine College, Inc. v. Rexroad, 191 W.Va. 209, 444 S.E.2d 566 (1994).

Id. at 489, 583 S.E.2d at 112. The presumptions set by this Court are not actually as broad as the Appellant argues in his brief. “For purposes of ruling on a Rule 12(b)(6) motion to dismiss, the facts as set out in the plaintiff's complaint are deemed to be true.” Whitehair v. Highland Memory Gardens, Inc., 174 W.Va. 458,459, 327 S.E.2d 438,439 (1985).(citing Sticklen v. Kittle, W.Va., 287 S.E.2d 148, 157 (1981); Mandolidis v. Elkins Indus., Inc., 161 W.Va. 695, 717, 246 S.E.2d 907, 920 (1978);John W. Lodge Distrib. Co. v. Texaco, Inc., 161 W.Va. 603, 605, 245 S.E.2d 157, 158 (1978)). Where the Appellant’s allegations go beyond those contained in his Complaint, or beyond any implication from the allegations in his Complaint, they are not presumed to be true.

The Appellees will be addressed within each argument section. As will be more fully outlined below, the Appellees are entitled to qualified immunity from suit for the allegations in this Complaint; the Appellant's Complaint fails to state grounds upon which relief may be granted; and the Appellant has failed to exhaust his administrative remedies. Therefore, the Appellant's Complaint must be dismissed.

c. THE STANDARD FOR A MOTION TO DISMISS

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is de novo." Syllabus Point 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W.Va. 770, 461 S.E.2d 516 (1995). A motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is a means of testing the formal sufficiency of a complaint. See Collia v. McJunkin, 178 W.Va. 158, 358 S.E.2d 242 (1987), *cert. denied*, 484 U.S. 944, 108 S.Ct. 303 (1987); Mandolitis v. Elkins Industries, Inc., 161 W.Va. 695, 717, 246 S.E.2d 907, 920 (1978)(superseded in part by statute see Gallapoo v. WalMart Stores, 197 W. Va. 172, 475 S.E.2d 172 (1996)). A motion to dismiss enables a court to weed out unfounded suits. Harrison v. Davis, 197 W.Va. 651, 478 S.E.2d 104 (1996). The primary purpose of a motion to dismiss is to seek a determination of whether the plaintiff is entitled to offer evidence in support of the claims made in the complaint. Dimon v. Mansey, 177 W.Va. 50, 52, 479 S.E.2d 339 (1996). Although a motion to dismiss for failure to state a claim is viewed with disfavor, if a plaintiff's complaint states no cause of action upon which relief might be granted, then the defendant's motion to dismiss should be granted. See Fass v. Newsco Well Services, Ltd., 350 S.E.2d 562, 564 (1986). Governmental immunities are properly determined pursuant to a motion to dismiss because the purpose of such immunities is to protect governmental officers from being subjected to suit. See

Hutchinson v. Huntington, 198 W.Va. 139, 479 S.E.2d 649 (1996). “Immunities under West Virginia law are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subjected to the burden of trial at all. The very heart of the immunity defense is that it spares the defendant from having to go forward with an inquiry in to the merits into the case.” Id. (Citing Swint v. Chambers County Comm., 514 U.S. 35 (1995)). This includes the burden of discovery. See Holland ex rel. Overdorff v. Harrington, 268 F.3d 1179, 1185 (10th Cir. 2001). Finally, “The ultimate determination of whether qualified or statutory immunity bars a civil action is one of law for the court to determine. Therefore, unless there is a bona fide dispute as to the foundational or historical facts that underlie the immunity determination, the ultimate questions of statutory or qualified immunity are ripe for summary disposition.” Messer v. Huntington Anesthesia Group, Inc., 218 W.Va. 4, 620 S.E.2d 144 (2005)(citing Syllabus point 1, Hutchison v. City of Huntington, 198 W.Va. 139, 479 S.E.2d 649 (1996)).

III. BRIEF RESPONSE TO 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[?]”

The circuit court was correct to dismiss the Plaintiff’s claims for misappropriation of identity against Appellee Marshall University because its web site instructed visitors that the information may not be up to date or accurate and instructed the visitors to contact the Appellee to confirm the accuracy. Additionally, a claim for misappropriation of identity for the failure to immediately update a website is a novel claim and as such cannot be a violation of a well

established law or right that Marshall University would have known. Thus, Marshall University was entitled to qualified immunity from this claim.

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 (sic) Dr. Yoak by delaying his board certification for one year.

The circuit court was correct to dismiss the Plaintiff's claim for negligence because this court has been clear that to maintain a claim against a public official or the agency for which he works a plaintiff must show more than mere negligence. He must show that a defendant acted maliciously, oppressively, or violated a known law or right. The circuit court correctly found that the Appellee was entitled to qualified immunity from suit for this claim.

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 of notice of, where:
 1. Dr. Yoak'[s] rights are recited in detail in the provision 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' contacts in the past had been to accept resignations prior to contact termination, without imposition of any forfeiture of pay and benefits,

2. The provisions of Title 133, Series 9, CSR, at § 133-9-8 explicitly acknowledged 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.

The circuit court correctly dismissed the Appellant's claims against UP&S and Marshall University because the Appellant breached the employment contract with his letter of resignation. When he breached this contract, the Appellees had the option to treat the contract as rescinded, keep the contract alive for the benefit of both parties, or treat the repudiation as putting an end to the contract for all purposes of performance. As such, neither UP&S nor Marshall was bound by the requirements of the Code of State Regulations. When the Appellant breached this contract, he no longer had a clearly established right to the protections listed in Title 133.

Dr. Yoak's appointment with UP&S was made by virtue of, and subject to the authority of the Marshall University Board of Governors. It specifically incorporated the provisions of the

Marshall University "Green Book" and Policy No. 36. West Virginia Higher Education Policy Commission Policy Bulletin No. 36 is outlined in 133 C.S.R. § 9-4.3. As such UP&S is a branch of the State, and must be entitled to the same immunity as the State itself. As such, his appointment with UP&S was made by virtue of, and was subject to, the authority vested by law in the Marshall University Board of Governors. His appointment was in accordance with the provisions of the current Higher Education Policy Commission's Policy Bulletin No. 36, and those of the Greenbook.

The Appellant raises that Marshall had a usage or custom of allowing professors to breach their contracts at any time and still allowed them to dictate the terms of their resignation. Evidence of usage or custom cannot be used to alter the express written language of a contract. The contract had an express term upon which it ended, June 30, 2005. There is no ambiguity in this term, and thus the circuit court was correct in granting the Appellees' Motion to Dismiss on this claim.

Finally, the circuit court has the right to take judicial notice of the "Green Book" which was specifically incorporated into the contract signed by Dr. Yoak. The "Green Book" adopted the administrative procedures for challenging a breach of employment contract or wrongful discharge outlined in Section 14, 15, and 16 of Series 36 and the provisions of W.Va. Code § 18-29-1 *et seq.*

ARGUMENT

- a. The Circuit Court was correct when it granted the Appellees' Motion to Dismiss on the Appellant's claims based on the Appellant's failure to state a claim upon which relief may be granted under Rule 12(b)(6).**

The Appellant argues that he stated a claim for invasion of privacy based on the failure of the Appellee to remove his name from their website. The circuit court noted the Appellees were entitled to qualified immunity for these claims and also noted that the website for the School of Medicine includes a clear disclaimer which states:

Information on the Marshall University Joan C. Edwards School of Medicine Web site is provided by faculty, staff, students 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 errors 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 within the site.

Marshall University School of Medicine website, disclaimer, available at

<http://musom.marshall.edu/disclaimer.asp> (last visited April 13, 2008). It also states that “[t]he School of Medicine will investigate all complaints involving personal Web pages and will remove or block material or links to material that violate federal or state law or University policy.” *Id.*

Additionally, the website for the University itself contains a similar disclaimer that states:

The content of the official Marshall University web site (<http://www.marshall.edu>) is maintained by multiple departments, organizations and individuals associated with Marshall University. This content is provided as a service to our visitors, and, as such, Marshall University cannot be held liable for the accuracy of the information. Visitors are encouraged to contact the parties responsible for publishing the content to the site to verify that the information is correct.

Marshall University website, available at <http://www.marshall.edu/www/sitedisclaimer.asp> (last visited April 13, 2008).

The Complaint alleges that his information was contained on the website up to May 7, 2005, “the Saturday preceding the filing of Plaintiff’s initial Complaint[.]” Complaint at ¶ 34. He did not allege that he contacted Marshall University and reported the error on the website. He did

not allege that his personal information remained on the website after he filed his initial Complaint. His initial Complaint made Marshall aware that its website had not been updated; it was removed shortly thereafter. Had he taken the effort to inform Marshall of the error, it could have been corrected. The Appellant argues that he was entitled to compensation from Marshall because it was unjustly enriched by his information being included on Marshall's website after he left its employ. The correct remedy for this alleged violation is the remedy provided in the disclaimer—to remove the his information from the website.

Next, the circuit court found that this claim is novel and that there is no authority to file suit for the failure to immediately remove an individual from a web site listing. The website information is similar to that of an informational brochure or directory. The Appellees could not be expected to withdraw every informational brochures in circulation that contained the Appellant's name. Likewise, the Appellees cannot be expected to change every phone book each time a faculty or staff member leaves their employ.

The Appellant attempts to argue that his claims are for misappropriation of identity, a claim he argues was recognized in Crump v. Beckley Newspapers, Inc., 173 W.Va. 699, 320 S.E.2d 70 (1984). The Appellant's reliance on Crump is misplaced. He cites to language contained in Crump where this Court cited to the analysis of Prosser, 48 Calif.L.Rev. at 389; W. PROSSER, THE LAW OF TORTS § 117 (1971), which was adopted in Restatement (Second) of Torts §§ 652A-652-E (1977). The language relied upon by the Appellant was quoted by this Court in a discussion of the difference between an action defamation and one for false light invasion of privacy, neither of which have been alleged in this case. The Appellant admits that his theory for

this claim was not discussed in West Virginia until an Order was entered on February 19, 2008 by the District Court for the Southern District of West Virginia. See Curran v. Amazon.com, Inc., Slip Copy, 2008 WL 472433 (S.D.W.Va. February 19, 2008).⁴

The very language quoted by the Appellant supports the conclusion of the circuit court.

The Appellant quoted the District Court when it stated:

Though the Supreme Court of Appeals has yet to definitively consider whether the common-law right 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.

Appellant Brief at 17 (citing Curran at at Slip Op. 9-10). The language in Crump immediately preceding the language quoted by the Appellant also recognizes that

There is no statutory right of publicity in West Virginia. The only mention of the right of publicity by the Supreme Court of Appeals of West Virginia was in a footnote in which it cautioned that the right of publicity must not be confused with the right of privacy and then explained the elements of a right of publicity claim.

Curran (citing Crump, 173 W. Va. at 714 n. 6, 320 S.E.2d at 85 n. 6).

The Appellant admits, as the District Court recognizes that the claim of misappropriation of identity contained in his complaint was not a well recognized cause of action in West Virginia. A public official cannot be held liable for violating a clearly established law unless that law has been clearly established. While the Appellant argues for an expansion of invasion of privacy to create a cause of action for misappropriation of identity for the failure to removing a name from a website, a State defendant is not the appropriate party. By definition, an expansion of the law

⁴ The language in Curran could not serve as the basis to make Marshall University aware of the potential claim for misappropriation of identity for the failure to remove a name from the web site in a timely fashion where the action in the Complaint occurred on November 19, 2004, and the order was not made until February 19, 2008, and the order has not been published.

cannot be a clearly established law of which a public official in the position of Dr. Denning would be aware. Thus, the circuit court was correct in granting the Appellees' Motion to Dismiss under Rule 12(b)(6).

b. The Circuit Court correctly granted the Plaintiff's Motion to Dismiss because the Defendants are entitled to qualified immunity from suit.

The Appellant argues that the circuit court erred in granting the Appellees' Motion to Dismiss his claims on the basis of qualified immunity. First, he alleges that University Physicians and Surgeons is not entitled to qualified immunity because it is a private, for-profit corporation. Second, the Appellant argues that the Appellee was not entitled to qualified immunity because he alleged that Defendant Denning violated 133 C.S.R. Series 9, which were explicitly outlined in his contract of employment and signed by Dr. Denning. Finally, the Appellant argues that Marshall's negligence when it incorrectly listed him as being board certified at a time when he was not entitled him to damages. The Circuit Court fully considered each issue properly before it and correctly granted the Appellees' Motion to Dismiss.

1. The Court was correct in granting the Appellee UP&S's Motion to Dismiss because his appointment with UP&S was made by virtue of, and was subject to, the authority vested by law in the Marshall University Board of Governors and in accordance with the provisions of the West Virginia Higher Education Policy Commission Policy Bulletin No. 36, and the Marshall University Green Book.

The Appellant argues in his appeal that UP&S is not entitled to qualified immunity because it is a private, for profit corporation. While the Appellant's Complaint identifies UP&S "is a privately held, for profit, West Virginia corporation" (Complaint at ¶ 6), this Court can take judicial notice that

UP&S is a not-for-profit corporation which is the practice group for the physicians employed as professors at Marshall University. Dr. Yoak's contract with UP&S states:

Pursuant to the provisions of section 4.3 of Policy Bulletin No. 36, all full-time faculty assigned to medical schools must render patient care services only at facilities affiliated with their assigned institution, and all fees for such professional medical services must be billed and collected by the faculty practice plan unless otherwise authorized in writing.

As the faculty practice plan of the School of Medicine, UP&S does not select medical staff members, but appoints to the medical staff individuals who are selected and engaged as faculty members by the Medical School. UP&S does not engage in the practice of medicine, but functions as an administrative service providing clinical space and support staff and billing, collection and payroll services. 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. Under the terms of the Medical Staff Appointment your participation in the clinical practice of medicine in the area(s) of your specialty or training is required to be conducted through UP&S, the faculty practice plan, except as may be authorized in writing.

In Graf v. West Virginia University, 189 W.Va. 214, 217 429 S.E.2d 496, 499 (1992), this Court recognized that an appointment like Dr. Yoak's appointment to UP&S "is made by virtue of, and is subject to, the authority vested by law in the West Virginia Board of Regents. Faculty appointments are in accordance with the provisions of the current Board of Regents Policy Bulletin No. 36, and those of the West Virginia University Faculty Handbook (1983)." Dr. Yoak's appointment was made by virtue of, and subject to the authority of the Marshall University Board of Governors. It specifically incorporated the provisions of the Marshall University "Green Book" and Policy No. 36. West Virginia Higher Education Policy Commission Policy Bulletin No. 36 is

outlined in 133 C.S.R. § 9-4.3. As such UP&S is a branch of the State, and must be entitled to the same immunity as the State itself.⁵

2. **The circuit court correctly granted Marshall University and Dr. Denning's Motion to Dismiss based on qualified immunity because the Appellant did not allege a violation of a specific law or that the Appellees acted maliciously, fraudulently, or oppressively.**

The Circuit Court outlined this Court's interpretation of common law doctrine of qualified immunity. See id. at 4-8. Qualified immunity is designed to protect public officials from the threat of litigation resulting from difficult decisions which must be made in the course of their employment. See e.g., Clark v. Dunn, 195 W.Va. 272, 465 S.E.2d 374 (1995). To sustain a viable claim against a State agency or its employees or officials acting within the scope of their authority sufficient to overcome this immunity, it must be established that the agency employee or official knowingly violated a clearly established law, or acted maliciously, fraudulently, or oppressively. Parkulo v. West Virginia Board of Probation and Parole, 199 W.Va. 161, 483 S.E.2d 507 (1996); Clark, 465 S.E.2d 394 (citing State v. Chase Securities, Inc., 188 W.Va. 356, 424 S.E.2d 591 (1991)). In other words, the State, its agencies, officials and employees are immune for acts or omissions arising out

⁵ The Appellant incorrectly argues that the circuit court erred when it granted the Appellees' motion to dismiss based on sovereign immunity grounds. The circuit court's decision, while including other grounds for granting the motion to dismiss, was granted on qualified immunity grounds, not sovereign immunity. Sovereign immunity is derived from Article VI, Section 35 of the West Virginia Constitution and is absolute and cannot be waived by the legislature or any other instrumentality of the State. See Mellon-Stuart Co. v. Hall, 178 W.Va. 291, 296, 359 S.E.2d 124, 129 (1987)(Citing Ohio Valley Contractors v. Board of Educ., 170 W.Va. 240, 293 S.E.2d 437 (1982); City of Morgantown v. Ducker, 153 W.Va. 121, 168 S.E.2d 298 (1969); State ex rel. Scott v. Taylor, 152 W.Va. 151, 160 S.E.2d 146 (1968); Petros v. Kellas, 146 W.Va. 619, 122 S.E.2d 177 (1961)), while qualified immunity is not absolute and is derived from common law.

of the exercise of discretion in carrying out their duties, so long as they are not violating any known law or acting with malice or bad faith. Syl. pt. 8, Parkulo.

While the Appellant alleges that the Appellees acted “unlawfully, and without justification or compliance with applicable procedure.” (Complaint at ¶¶ 14, 15, and 16) and that Dr. Denning’s actions “were taken with full knowledge of their illegality and were motivated by actual malice[,]” (Complaint at ¶ 17), he did not alleged that the Appellees’ actions violated any clearly established statutory or constitutional rights of which a reasonable person in Dr. Denning’s position would have known about. The simple use of the word malice to describe Dr. Denning’s actions is insufficient to overcome the Appellees entitlement to qualified immunity. C.f. Pinder v. Johnson, 54 F.3d 1169, 1173 (4th Cir. 1996)(stating that for a right to be clearly established, it must be established in a particularized and relevant sense, not merely as an overarching entitlement to due process.”)

The Appellant’s Complaint lists various causes of actions under which he alleges an entitlement to relief. However, it does not allege any violations of a specific statute or of a particularized denial of any constitutional right. The Circuit Court recognized the Appellant’s attempt to include allegations of a violation of 133 C.S.R. § 9-12. See Order at 6 (citing Complaint at ¶ 16). However, the court correctly found that the Appellant was not entitled to the benefits of a contract which he admittedly breached. As discussed below, This argument based on the incorporation of 133 C.S.R. Series 9 is disingenuous. When the Appellant breached his employment contracts on November 17, 2004 with his letter of resignation, he made it clear to the Appellees that he had no intention to comply with the terms of his employment contracts. Upon this breach the Appellees had every right to treat the Appellant’s repudiation as putting an end to the contracts for all purposes of performance, including the provisions of 133 C.S.R. Series 9. See Syl. Pt. 1, Annon v. Lucas, 155

W.Va. 368, 185 S.E.2d 343 (1971). This 133 C.S.R. Series 9 cannot serve as the specific law that was violated by the Appellees.

In discussing qualified immunity, this Court relied on previous discussions from federal courts on the purpose of qualified immunity and commented that qualified immunity is designed to “insulate the decision making process from the harassment of prospective litigation.” Id. at 361, 424 S.E.2d at 596. “The provision of immunity rests on the view that the threat of liability will make federal officials timid in carrying out their official duties, and that effective government will be promoted if officials are freed the costs of vexations and often frivolous damages suits.” Id. (quoting Westfall v. Erwin, 484 U.S. 292, 295 (1988)).

In Chase, this Court adopted the test used by the United States Supreme Court in Harlow v. Fitzgerald, holding that “government officials performing discretionary functions generally are shielded from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Chase at 362, 424 S.E.2d at 597 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982)). The Court explained further that the term “reasonable person” is defined as a “a reasonable public official occupying the same position as the defendant public official.” Id. at n. 16,(citing Anderson v. Creighton, 483 U.S. 635 (1987)).

This Court explicitly extended the qualified immunity to which the official was entitled to the State, stating: “we endorse the principle, expressed in the Restatement, that the immunity of the State is ordinarily coterminous with the qualified immunity of the public executive official whose acts or omissions give rise to an action [.]” Parkulo v. West Virginia Bd. of Probation, 199 W.Va. 161, 177-8, 483 S.E.2d 507, 523-4 (1996). Accordingly, Dr. Denning, the Marshall and UP&S are shielded from liability because qualified immunity is coterminus.

The circuit court also outlined the purpose behind qualified immunity. See Order at 7-8. Dispositive motions filed on behalf of governmental defendants which, as is the present case, implicate numerous immunities require unique consideration. “Immunities under West Virginia law *are more than a defense to a suit in that they grant governmental bodies and public officials the right not to be subject to the burden of trial at all.*” Hutchinson v. City of Huntington, 198 W.Va. 139, 479 S.E.2d 649 (1996) (emphasis added). Indeed “[t]he very heart of the immunity defense is that *it spares the defendant from having to go forward with an inquiry* into the merits of the case.” Id. (emphasis added) (Citing Swint v. Chambers County Commission, 514 U.S. 35 (parallel citations omitted) (1995)). As Justice Cleckley in Hutchinson wrote:

As assertion of qualified or absolute immunity should be heard and resolved prior to any trial because, if the claim of immunity is proper and valid, the very thing from which the defendant is immune – a trial – will absent a pretrial ruling occur and cannot be remedied by a later appeal. On the other hand, the trial judge must understand that a grant of summary judgment based upon immunity does not lead to a loss of right that cannot be corrected on appeal.

Id. at note 13.

Similarly, the United States Supreme Court used almost identical reasoning to that of Justice Cleckley in Hutchinson to guide the federal judiciary as to the importance of a government official’s right to be summarily dismissed from litigation when qualified immunity is applicable. Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001). “The privilege of immunity from suit is an immunity rather than a mere defense to liability, and like absolute immunity *it is effectively lost if a case is erroneously permitted to go to trial.*” Id. (emphasis added). Further, Saucier holds that immunities spare governmental defendants from the other burdens of litigation. Id. Other burdens of litigation have been held to include discovery. See Holland ex rel. Overdorff v. Harrington, 268

F.3d 1179, 1185 (10th Cir. 2001). Therefore, the Appellees should not be subjected to the burdens of litigation and this Court must uphold their dismissal from this suit.

3. The circuit court correctly found that the Appellees were entitled to qualified immunity for his negligence claims.

The Appellant argues that he stated a claim that was separate and independent from his employment claims by alleging that Marshall was negligent in publishing information about his board specialty before he had obtained the certification. The Appellant claims that the Circuit Court failed to address this issue in its Order. However, the Circuit Court found that the Appellees were entitled to qualified immunity. A claim for negligence does not show that a public official breached a specific law, or acted maliciously or oppressively. See Parkulo v. West Virginia Board of Probation and Parole, 199 W.Va. 161, 483 S.E.2d 507 (1996). Therefore, the Circuit Court Order addressed all of the Appellant's claims, and was correct in granting the Appellees' Motion for Summary Judgment on the ground of qualified immunity.

c. The Appellant breached a clear and unambiguous contract for employment.

The Appellant alleged in Paragraph 15 of his Complaint that Title 133, Series 9 of the Code of State Regulations governed his contract with Marshall. He then alleged that

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 at ¶ 17. As will be more fully outlined below, when the Appellant submitted his letter of resignation on November 18, 2004, the Defendants had three options: 1. **Treat the contract as**

rescinded and recover on *quantum merit*; or 2. Keep the contract alive for the benefit of both parties, being at all times 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 3. *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. See Syl. Pt. 1, Annon v. Lucas, 155 W.Va. 368, 185 S.E.2d 343 (1971)(emphasis added). If the Appellees chose not to seek damages, which they did, they still had three choices. 1. Treat the contract as rescinded; 2. Keep the contract alive; or 3. Treat the repudiation as putting an end to the contract. Id. Dr. Denning's response to Dr. Yoak's repudiating the contract can fall under two of the three options. Id.

On November 17, 2004, the Plaintiff gave notice that he was resigning his appointment with both the SOM and UP&S. See Complaint at ¶ 13. Based on the allegations in the Complaint, the Appellees had every right to rescind the contract and put an end to it for all purposes of performance. Therefore the Court did not err in finding that the Appellant is not entitled to claim the benefits of a contract that he had already breached. See Circuit Court Order at 7.

The Appellant cannot escape his obligations under his contracts for employment by arguing that the pattern an practice of the Defendants is to allow doctors to breach their employment contract while they choose to honor it. "Contracts are reduced to writing so that there can be no subsequent argument concerning the terms of an agreement." Reddy v. Community Health Foundation, 171 W.Va. 368, 337, 298 S.E. 2d 906, 910 (1982). Custom and usage cannot be considered to interpret a contract unless the contract term is ambiguous on its face. See In re Joseph G., 214 W.Va. 365, 370, 589 S.E.2d 507, 512 (2003). In In re Joseph G., this Court stated that

"[c]ontract language is considered ambiguous where an agreement's terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken." Syl. pt. 6, State ex rel. Frazier & Oxley, L.C. v. Cummings, 212 W.Va. 275, 569 S.E.2d 796 (2002). Once we have determined a contract to be ambiguous, we look to the parties' relationship to glean the parties' intent in entering into the agreement under scrutiny. "Evidence of usage or custom may be considered in the construction of language of a written instrument which is uncertain or ambiguous but may not be considered to alter the legal effect of or to engraft stipulations upon language which is clear and unambiguous." Syl. pt. 5, Cotiga [Dev. Co. v. United Fuel Gas Co.], 147 W.Va. 484, 128 S.E.2d 626[(1962)].

In re Joseph G., 214 W.Va. 365, 370, 589 S.E.2d 507, 512 (2003). This Court has further noted:

"A valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent." Toppings v. Rainbow Homes, Inc., 200 W.Va. 728, 733, 490 S.E.2d 817, 822 (1997); See Syllabus Point 2, Orteza v. Monongalia County General Hospital, 173 W.Va. 461, 318 S.E.2d 40 (1984) ("Where the terms of a contract are clear and unambiguous, they must be applied and not construed"). "The function of the court is to interpret and enforce written agreements and not to make, extend or limit the written agreement." Toppings v. Rainbow Homes, Inc., 200 W.Va. 728, 733, 490 S.E.2d 817, 822 (1997)(quoting Syllabus Point 3, Cotiga Development Co. v. United Fuel Gas Co., 147 W.Va. 484, 128 S.E.2d 626 (1962)("It is not the right or province of a court to alter, pervert or destroy the clear meaning and intent of the parties as expressed in unambiguous language in their written contract or to make a new or different contract for them."))

State ex rel. Wells v. Matish, 215 W.Va. 686, 600 S.E.2d 583 (2004).

The Appellant does not allege that his contract for employment was ambiguous or unconscionable, only that Marshall has not enforced the terms with other faculty members on other contracts. Thus, even if Marshall had previously allowed faculty members to resign before the end date of their contract while choosing not to rescind the contract, the Appellant could cite to no legal precedent supporting his position.

The Appellant's contracts for employment was clear and unambiguous. There is no need to interpret "June 30, 2005", it is clear and unambiguous as to the term of the contract. The Appellant was initially appointed as an Assistant Professor of Surgery at Marshall in July, 2002. See Complaint at ¶ 10. His initial appointment ran from July 1, 2002 to June 30, 2003. See id. He also received an appointment to practice medicine with UP&S.⁶ See id. These appointments were renewed annually, up to and including, an appointment from July 1, 2004 to June 30, 2005. See id. There is nothing ambiguous about June 30, 2005. As such, the circuit court was correct to ignore the Appellant's claims that the custom and practice has been applied differently in prior faculty resignations.

The Appellant admits that on November 17, 2004, he gave notice that he was resigning his appointment with both the Marshall and UP&S. See id. at ¶ 13. This notice constituted a breach of any employment contract between the Appellant and the Appellees. On November 19, 2004, the Appellees chose to treat the notice as a repudiation and treat the contract as rescinded effective on December 3, 2004, rather than December 31, 2004, as suggested by the Appellant. See Complaint at ¶ 17. The Appellant alleges these actions were unlawful and without justification. He further alleges that Dr. Denning's actions "were taken with full knowledge of the illegality and were motivated by actual malice." Complaint at ¶ 17.

The Appellant is presumed to know the contents of the contract he enter. Hoffman v. National Equipment Rental, Ltd., 643 F.2d 987, 991 (4th Cir.1981); see also Syllabus, R.D. Johnson Milling Co. v. Read, 76 W.Va. 557, 85 S.E. 726 (1915) ("In the absence of fraud on the part of the grantee, or mutuality of mistake by both parties to a deed, it will not be set aside or altered on the ground that

⁶ The Appellant's employment with UP&S was contingent on his continuing in his position with Marshall. See Exhibit B, attached to the Plaintiff's Response to the Defendant's Motion to Dismiss.

the grantor was ignorant of its contents.”); Mercury Coal & Coke, Inc. v. Mannesmann Pipe and Steel, 696 F.2d 315, 318 (4th Cir. 1982). As such, the Appellant is presumed to know that submitting a letter of resignation on November 17, 2004, when his contract did not end until June 30, 2005 was a breach of his employment contract. When the Appellant notified the Appellees that he had no intention completing the terms of the contract he breached it. This repudiation gave the Appellees three options with dealing with the breach. Marshall chose the third,⁷ to “*treat the repudiation as putting an end to the contract for all purposes of performance.*” See Syl. Pt. 1, Annon v. Lucas, 155 W.Va. 368, 185 S.E.2d 343 (1971)(emphasis added).

The Appellant argues that the circuit court erred in considering the issue of anticipatory breach of contract because the doctrine of anticipatory breach only applies to the timing of court actions by the injured party and the measure of damages available under that action. The Appellant attempts to illustrate to this Court the long history of anticipatory breach dating back to the Queen’s Bench, and how each case only dealt with the timing of suit and the measure of damages available in a contract action. This argument is not well placed. While the doctrine of anticipatory breach does establish different times in which a suit can be filed and the amount of damages available, it also establishes whether the non-breaching party is obligated to complete performance. This argument ignores the explicit language of Annon which allows the non-breaching party three options upon the repudiation of the contract. In Syl. Pt. 1 of Annon this Court noted that the injured party “may treat the repudiation as *putting an end to the contract for all purposes of performance*[.]” “All purposes of performance” must necessarily include the provisions of Title 133, Series 9 of the Code of State

⁷ The Appellees’ actions could also fall under the first choice—treat the contract as rescinded.

Regulations. Annon further notes that “It is a fundamental rule of the common law that no man shall be permitted to profit by his own wrong.” Annon at 382, 185 S.E.2d at 352 (quoting Carleton Mining & Power Company v. West Virginia Northern Railroad Company, 113 W.Va. 20, 166 S.E. 536, *certiorari denied*, 289 U.S. 734, 53 S.Ct. 594, 77 L.Ed. 1482(1932)). The Appellant cannot breach his contract and then claim the protections of it. As such, the circuit court was correct in granting the Appellees’ Motion to Dismiss.

The Appellant next argues that the Appellees admitted that they were not inconvenienced in any way by his early resignation. This argument is irrelevant to the decision of this Court.⁸ This is an issue of damages, not whether the Appellees were entitled to rescind a contract that the Appellant had already repudiated. Thus, circuit court was correct in applying the doctrine of anticipatory breach was applicable to this case.

- d. **The circuit court correctly took notice of the Marshall University “Green Book” because it was the policy applicable to all faculty appointments at Marshall University as was incorporated into the Appellant’s contracts for employment.**

The circuit court has the right to take judicial notice of the “Green Book” which was specifically incorporated into the contract signed by Dr. Yoak. When he accepted his appointment as a faculty member at Marshall, and each time he accepted the offer to renew the appointment, he agreed to the following:

This offer of appointment and all the terms and conditions contained herein are subject to the provisions of West Virginia Higher Education Policy Commission Title 133, Procedural Rules Series 9, which is incorporated herein by reference. *Additional information regarding faculty appointments, rights, duties, and responsibilities is contained in the Marshall university “Greenbook” and West Virginia Higher Education Policy Commission Title 133, Procedural Rule 9, the provisions of West*

⁸ Obviously, the Appellant feels that finding a plastic surgeon qualified and willing to teach medical school in the middle of a semester is no inconvenience.

Virginia Higher Education Policy Commission Title 133, Procedural Rule 9 take precedence over those contained herein or elsewhere.

Exhibit 2, section D of the Plaintiff's Response to Motion for Summary Judgment. Thus, in addition to the terms of the Code of State Regulations, he agreed to terms of the Greenbook. As previously noted, this Court recognized that an the appointment of a faculty member is subject to the faculty handbook—the Greenbook. See Graf v. West Virginia University, 189 W.Va. 214, 217 429 S.E.2d 496, 499 (1992). Thus, the Appellant's argument that there was no "Green Book" or evidence of Marshall's adoption of any provisions that were alternate to Series 9 of Title 133 is misplaced, the contract itself incorporates the Greenbook.⁹ The Appellant attached a copy of the his contracts to his Response to the Motion to Dismiss. It was properly before the Court. As such, the Court was entitled to take judicial notice of the Greenbook incorporated into the contracts.

- e. **The Circuit Court was Correct in finding that if the Appellant was alleging that the Appellees had failed to comply with the terms of his employment contract while he was employed, then he was required to exhaust the administrative remedies available to him.**

The Circuit Court was correct to find that failure to exhaust administrative remedies deprives this Court of subject matter jurisdiction over the Appellant's claims. See Booth v. Churner, 532 U.S. 731, 121 S. Ct. 1819 (2001) (exhaustion of administrative remedies is required even if the administrative remedy will not provide the relief sought by the claimant).¹⁰

⁹ The Green Book adds categories of reasons for the dismissal of faculty. Including: "Personal conduct which substantially impairs the individual's fulfillment of institutional responsibilities." Green Book at 19. Obviously, the Appellant's resignation substantially impaired his ability to fulfill his responsibilities to Marshall.

¹⁰ In the context of tort claims against the United States, administrative prerequisites to filing suit have been held to be jurisdictional. McNeil v. United States, 508 U.S. 106 (1993).

The Appellant admits that Series 9, Title 133 provided notice and the opportunity to be heard, but he does not recognize this as an administrative procedure. He argues that there was no "Green Book" or evidence of Marshall's adoption of any provisions that were alternate to Series 9 of Title 133, and thus Series 9 was the only applicable policy. As previously noted, the Appellant attached a copy of the his contract for employment with Marshall to his Response to the Motion to Dismiss. When he accepted his appointment as a faculty member at Marshall, and each time he accepted the offer to renew the appointment, he agreed that "[a]dditional information regarding faculty appointments, rights, duties, and responsibilities is contained in the Marshall university "Greenbook". . . ." Exhibit 2, section D of the Plaintiff's Response to Motion for Summary Judgment. T h e Appellant has cited to the reasons for termination under the C.S.R, while ignoring the reasons set forth in the Greenbook. Additionally, in arguing that he had no requirement to exhaust his administrative remedies, he ignored other language in his contracts. In his contract with Marshall University, he agreed that

This appointment is full-time beginning July 1, 2004, and is classified as a Clinical Track (non-tenure) appointment pursuant to the provisions of West Virginia Higher Education Policy Commission Title 133, Procedural Rule Series 9 which sets forth procedural rules regarding academic freedom and responsibility, appointment, promotion, tenure and nonreappointment or dismissal of faculty, **grievance procedures** and other matters related to faculty, and by which authority this offer of appointment is extended and governed.

The grievance procedure in Series 9 is outlined in 133 C.S.R. § 9-15, which adopts the procedures set forth in W.Va. Code § 29-6A-1 *et seq.* In fact, the Greenbook in effect at the time of the Appellant's resignation merely adopted Series 9, Section 15, in whole—the very "notice and opportunity to be heard" the Appellant has argued was available to him while ignoring the Greenbook. This section states: "A faculty member wishing to grieve or appeal any action of the

institution or Governing Board may utilize the procedures set out in W.VA. Code 29-6A.” It then listed W.Va. Code § 29-6A-1 *et seq.*¹¹

The Appellant argues that Title 133 has no exhaustion requirement. Title 133 simply adopts the procedures contained in W.Va. Code § 29-6A-1 *et seq.* This Court has noted:

“The rule of exhausting administrative remedies before actions in courts are instituted is applicable, even though the administrative agency cannot award damages[,] if the matter is within the jurisdiction of the agency.” Syl. Pt. 3, Bank of Wheeling v. Morris Plan Bank & Trust Company, 155 W.Va. 245, 183 S.E.2d 692 (1971).

Syl. Pt. 4, State ex rel. Smith v. Thornsbury, 214 W.Va. 228, 588 S.E.2d 217 (2003). As such, the Circuit Court was correct to find that it was deprived of subject matter jurisdiction because the Appellant failed to exhaust his administrative remedies prior to filing suit.. *Id.* at 233, 588 S.E.2d 222.

This Court recently examined statutory exhaustion requirements as it relates to the pre-suit notice contained in W. Va. Code § 55-17-3(a)(1).¹² This Court examined state and federal laws from various jurisdictions and recognized that “Federal courts have consistently recognized that the prior filing of an administrative claim, *including the exhaustion of administrative remedies*, is a jurisdictional prerequisite to the filing of a federal court action under the Federal Tort Claims Act.” Motto v. CSX Transp., Inc., 220 W.Va. 412, 647 S.E.2d 848 (2007) (Citing Celestine v. Mount Vernon Neighborhood Health Center, 403 F.3d 76, 82 (2nd Cir.2005); Cook v. United States, 978 F.2d 164, 166 (5th Cir.1992) Cizek v. United States, 953 F.2d 1232, 1233 (10th Cir.1992); Meridian Int'l Logistics, Inc. v. United States, 939 F.2d 740, 743 (9th Cir.1991) Henderson v. United States, 785

¹¹ The Legislature replaced W.Va. Code § 29-6A-1 *et seq.* with W. Va. Code, § 6C-2-1 *et seq.* with Acts 2007, c. 207, which was effective March 7, 2007.

¹² The Appellees note that the Appellant’s original filing of the Complaint was dismissed based on the Appellant’s failure to provide pre-suit notice as required by W.Va. Code § 55-17-3.

F.2d 121, 123 (4th Cir.1986); Lykins v. Pointer, Inc., 725 F.2d 645, 646 (11th Cir.1984); Berlin v. United States, 9 F.Supp.2d 648, 651 (S.D.W.Va.1997). This Court then noted numerous states that have held statutory pre-suit notices were jurisdictional prerequisites to filing suit. (Citations omitted).¹³ This Court concluded that the notice provisions of W.Va. Code § 55-17-3(a) are jurisdictional in nature. Likewise, the failure to exhaust the administrative remedies outlined in W.Va. Code § 29-6A-1 *et seq* are jurisdictional.

This Court noted:

As we recognized in syllabus point one of Cowie v. Roberts, 173 W.Va. 64, 312 S.E.2d 35 (1984): “ ‘The general rule is that where an administrative remedy is provided by statute or by rules and regulations having the force and effect of law, relief must be sought from the administrative body, and such remedy must be exhausted before the courts will act.’ Syl. Pt. 1, Daurelle v. Traders Federal Savings & Loan Association, 143 W.Va. 674, 104 S.E.2d 320 (1958).” Appellants had at their disposal the grievance procedures set forth in West Virginia Code §§ 18-29-1 to -11 (1994 & Supp.1997)[.]¹⁴

Kincell v. Superintendent of Marion County Schools, 201 W.Va. 640, 499 S.E.2d 862 (1997). The Legislative intent expressed in statute creating grievance procedures for employees of state education institutions is to provide a simple, expeditious, and fair process for resolving problems. Wounaris v. West Virginia State College, 588 S.E.2d 406, 214 W.Va. 241 (2003). Ignoring the administrative process provided in the Greenbook, Title 133, and W.Va. Code § 29-6A-1 *et seq*. defeat this purpose.

The Appellant points to Fayette County Bd. Of Educ. V. Lilly, 184 W.Va. 688, 403 S.E.2d 431 (1991) to argue that exhaustion is not required where the grievance procedure would have been

¹³ This Court also noted some states that, while not a jurisdictional requirement, presuit notices provide a defense to suit. (Citations omitted)

¹⁴ W.Va. Code §§ 18-29-1 *et seq*. was the educational counterpart to W.Va. Code §§ 29-6A-1 *et seq*.

futile. The administrative remedies available to him would not have been futile. Lilly makes it clear that where the grievance board can provide the remedy requested, then the procedures must be exhausted. Here, the Appellant alleges that he was wrongly terminated on November 19, 2004. Any loss of wages or payment for benefits to which he was entitled are squarely within the jurisdiction of the grievance board. Thus, exhausting his administrative remedies would not have been futile.

Finally, the Appellant argues that he was not required to exhaust his administrative remedies because “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.

133 § C.S.R. 9-8.1 states:

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.

This section does not authorize the breach of an employment contract. It merely recites the faculty member's ethical obligation to the university when considering leaving its employ, at any time. This section does not do away with the administrative procedures available to the faculty member when they feel the university is not meeting its obligations under the contract. As such, this section does not authorize the breach of an employment contract, nor does it excuse the exhaustion requirement. Therefore, the circuit court was correct when it dismissed the Appellant's claims for failing to exhaust his administrative remedies.

V. CONCLUSION

This Court should affirm the decision of the circuit court because the its Order is correct. The Appellant's Appeal fails to establish an error in the Order. The Appellees are entitled to qualified immunity from suit for the Appellant's claims. The Appellant repudiated his employment contracts when he submitted a resignation letter in the middle of the academic year when his contract ran to the end. Under the doctrine of anticipatory breach, the Appellees had the option to rescind the remainder of the contract. The circuit court was correct when it did not consider evidence of usage and custom because the contract of employment was not ambiguous. Additionally, each of the Appellees demonstrated their entitlement to qualified immunity to the Circuit Court. Further, the Appellant's contract with UP&S was under the authority and provisions of the Code of State Regulations. As an instrumentality of the State, it too was entitled to qualified immunity. His contract with UP&S ended by its terms when his employment with Marshall ended. Finally, the Appellant's novel claims for misappropriation of identity and his claims for negligence are properly covered by the Circuit Court's Order. Therefore, the Circuit Court's Order granting the Appellees' Motion to Dismiss was appropriate.

WHEREFORE, for the forgoing reasons, the Appellees move this Honorable Court to deny the Appellant's to Appeal.

MARSHALL UNIVERSITY BOARD OF GOVERNORS; UNIVERSITY PHYSICIANS AND SURGEONS, INC.; and DAVID A. DENNING, M.D.

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APPEAL NO. 33863

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MATTHEW BRIAN YOAK, M.D.,

Appellant,

v.

MARSHALL UNIVERSITY BOARD OF
GOVERNORS; UNIVERSITY PHYSICIANS AND
SURGEONS, INC.; and DAVID A. DENNING, M.D.

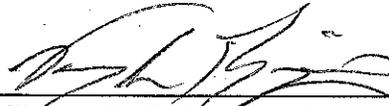
Appellee.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that the foregoing "Appellee Brief" has been served upon the following counsel of record by this day mailing true copies thereof:

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Done this 17th day of April, 2008.



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